

July 2015

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Recommended Citation

Goots, Thomas R. (1995) "'A Thug in Prison Cannot Shoot Your Sister': Ohio Appears Ready to Resurrect the Habitual Criminal Statute - Will It Withstand an Eighth Amendment Challenge?," *Akron Law Review*: Vol. 28 : Iss. 2 , Article 5.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol28/iss2/5>

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**“A THUG IN PRISON CANNOT SHOOT YOUR SISTER”¹:
OHIO APPEARS READY TO RESURRECT THE HABITUAL
CRIMINAL STATUTE —WILL IT WITHSTAND
AN EIGHTH AMENDMENT CHALLENGE?**

INTRODUCTION

A 12-year-old girl is having a “sleep over” with two of her friends.² A bearded man abducts her at knife-point, while her two friends watch in horror.³ Polly Klaas is later found dead.⁴ The main suspect in the case is Richard Allen Davis.⁵ Davis is a “career criminal” and his actions caused the citizens of California to move swiftly to enact a “Three Strikes and You’re Out” law.⁶ If California had a habitual offender statute prior to this year,

1. Doug McInnis & Catherine Candisky, *Three Strikes Proposal is a Pitch not Everyone Likes*, COLUMBUS DISPATCH, Feb. 15, 1994, at 1A (quoting Ohio state Rep. Gene Krebs sponsor of one of the many “three strikes” bills being contemplated by the Ohio legislature).

2. Ron Sonenshine, *Private Detective Joins Search for Polly*, S.F. CHRON., Nov. 2, 1993, at A16. Polly Klaas was a seventh-grader at Petaluma (California) Junior High School. *Id.*

3. *Id.*

4. *Tragic Finale to Polly Case*, S.F. CHRON., Dec. 7, 1993, at A24.

It was the ending that everyone had feared, but could not bring themselves to accept.

The reality when it came was swift and crushing. A bright, lively girl is dead; her promising future violently unspooled. Polly Klaas’ winning smile stares back helplessly from all those posters so diligently fashioned in hopes she might be brought back.

...

They should have been secure. Here were careful, concerned people living in a quiet community almost prosaically typical of the American good life.

A destroyer of innocence invaded a home.

Id.

5. Ron Sonenshine, *Convicted Kidnapper Held in Polly Case He’s Linked to Site Where Clues Found*, S.F. CHRON., Dec. 2, 1993, at A1. Marc Klaas, Polly’s father, “called Davis a ‘two-time loser’ who has no business being out on the street.” *Id.* The main suspect in the case has a long list of previous convictions. *Id.* Richard Allen Davis has been convicted of kidnapping twice, along with convictions for “various counts of robbery, grand theft, assault with a deadly weapon and receiving stolen property.” *Id.*

6. Vlae Kershner & Greg Lucas, *‘Three Strikes’ Signed into California Law Wilson Says ‘Career Criminals’ Will Become ‘Career Inmates’*, S.F. CHRON., Mar. 8, 1994, at A1. “The speedy enactment of the law – just three months after the arrest of career criminal Richard Allen Davis in the murder of Polly Klaas – was testimony to the power of public anger.” *Id.* Davis had committed felonies previously and had just been released after serving “eight years of a 16-year sentence for kidnapping . . .” *Id.*

Politicians, with the blessing of the Klaas family, turned the 13-year-old Petaluma girl’s funeral into a testament for a ‘three strikes’ law.

maybe a 13-year-old girl would still be alive to enjoy another sleep over with her friends. There are critics of "Three Strikes" laws who say that the laws are inequitable.⁷ Maybe the critics should remember Polly Klaas and then they might not be as concerned with a few inequities.

"Three Strikes and You're Out" is just another name given to habitual criminal statutes.⁸ The statutes allow courts to incarcerate persistent felons for extended periods of time, and in some cases, life imprisonment.⁹ The statutes have been challenged in the past on many grounds, including that the statutes violate the 8th Amendment's prohibition of cruel and unusual punishment.¹⁰

The State of Ohio appears ready to pass a habitual offender statute.¹¹ This Comment will take a closer look at habitual offender statutes in general and Ohio's past attempts at habitual offender statutes. The Comment will focus on the possible Eighth Amendment challenge to the proposed Ohio statute, by examining a hypothetical defendant.

HISTORY/BACKGROUND

There are many other names for "three strikes and you're out" laws, including, habitual offender statutes,¹² persistent offender statutes,¹³

As a result, [the] bill, which had been bottled up in committee last year, quickly gained a head of steam rarely seen in the political world.

Id.

7. See *infra* notes 42-61 and accompanying text.

8. See Ludlow, *infra* note 140, at 1A. "Three strikes and your out" is the name given to legislation that mandates life imprisonment for three-time violent felony offenders. *Id.*

9. See, e.g., Robert R. Bensko, Jr., *Florida's Habitual Felony Offender Statute: New Life for an Old Law*, 66 THE FLA. BAR J., 49 (Oct. 1992). The article discusses Florida's recently amended habitual offender statute. *Id.*

The statute can significantly affect a prison sentence because it allows the extension of the normally prescribed statutory maximum for a felony on the basis of a defendant's prior felony record. For example, whereas the normal statutory maximum for a first-degree felony is 30 years, under the statute it is life imprisonment.

Id.

10. See *infra* notes 98-110 and accompanying text.

11. See Thomas Suddes, *'Three Strikes' Law Won't Be Crime Cure-all*, PLAIN DEALER (Cleveland), Feb. 25, 1994, at 1A. "Now pending in [the] . . . state Senate, the proposal . . . would require criminals to be sentenced to life without parole the third time they commit any of 12 violent crimes, such as murder, rape, and kidnapping." *Id.*

12. See ARK. CODE ANN. § 5-4-501 (Michie 1993).

13. See CONN. GEN. STAT. § 53a-40 (1994).

dangerous and repetitive offender statutes,¹⁴ recidivist¹⁵ statutes,¹⁶ repeat offender statutes,¹⁷ habitual criminal statutes,¹⁸ habitual felon statutes,¹⁹ and "second and subsequent offender" statutes.²⁰ Regardless of the name, each of these statutes has the same goal.²¹ The statutes endeavor to keep criminals, who repeatedly commit crimes, off the street.²²

Habitual criminal statutes have existed in this country since the late 1700's.²³ They have been part of criminal law since as early as the 17th century.²⁴ According to the U.S. Department of Justice, forty-seven (47) states, the District of Columbia, and the federal system have some form of habitual offender statute on the books.²⁵

Habitual offender statutes are just another form of punishment. There are many different theories regarding punishment, its objectives and its consequences.²⁶ As punishment, habitual offender statutes fall under the category

14. See ARIZ. REV. STAT. ANN. § 13-604 (1994).

15. THE AMERICAN HERITAGE DICTIONARY 575 (Office ed. 1987). Recidivism is "[a] tendency to relapse into a former pattern of behavior, esp. a tendency to return to criminal habits." *Id.* The word is derived from the Latin word *recidere*, to fall back. *Id.* A recidivist is one who exhibits recidivism. *Id.*

16. Karen D. Bayley, Note, *State v. Davis: A Proportionality Challenge to Maryland's Recidivist Statute*, 48 MD. L. REV. 520 (1989).

17. See GA. CODE ANN. § 17-10-7 (1993).

18. See DEL. CODE ANN. tit. 11 § 4214 (1993).

19. See FLA. STAT. ch. § 775.084 (1994).

20. See KAN. STAT. ANN. § 21-4504 (1993).

21. See Bayley, *supra* note 16, at 524. "[T]he purpose of . . . recidivist statute[s] – 'to identify and target a unique class of people so that they may be permanently exiled from our free society.'" *Id.*

22. *Id.*

23. Michael Cavalier, Note, *Recidivist Laws Under the Eighth Amendment – Rummel v. Estelle*, 10 U. TOL. L. REV., 606, 609 (1979). The first habitual offender statute in the United States was N.Y. Laws ch. 30 (1797). *Id.* at n.18. The law "enhanced [the] sentence for the second conviction." *People v. Morse*, 465 N.E.2d 12, 18 (N.Y. 1984).

24. See Markus D. Dubber, Note, *The Unprincipled Punishment of Repeat Offenders: A Critique of California's Habitual Criminal Statute*, 43 STAN. L. REV. 193, 194 (1990). King Louis XIV passed a recidivist law for blasphemers which had as its punishment for the first offense a fine and the punishment for the seventh offense having one's tongue completely cut out. *Id.* at 194-95.

25. NATIONAL INSTITUTE OF JUSTICE, REPEAT OFFENDER LAWS IN THE UNITED STATES: THEIR FORM, USE AND PERCEIVED VALUE 2. This compares with the 1920's when only six states had habitual offender statutes. *Id.* at 5. Recidivist statutes increased in popularity because the public felt the crime rate was rising and "penal practices . . . were regarded . . . as 'soft' and ineffective." *Id.* at 5.

26. See, e.g., JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960). See also WAYNE R. LAFAYE AND AUSTIN W. SCOTT JR., CRIMINAL LAW §1.5 at 22-29 (2d ed.

ries of restraint, prevention and deterrence.²⁷ It has been suggested that habitual offender laws validate the belief "that the punishment should fit the offender and not merely the crime."²⁸ There are those who suggest the proper method for dealing with sentencing a criminal is to individualize the sentence.²⁹ Habitual offender statutes are the antithesis of individualized sentencing.³⁰

General Structure and Variations of Habitual Criminal Statutes

Many states have habitual criminal statutes in one form or another.³¹ Some jurisdictions impose mandatory additional sentences for recidivists but

1986) (the six theories of punishment are prevention, restraint, rehabilitation, deterrence, education, and retribution). "[Prevention] aims to deter the criminal himself (rather than to deter others) from committing further crimes, by giving him an unpleasant experience he will not want to endure again." *Id.* at 23. The basis of the restraint theory of punishment is "that society may protect itself from persons deemed dangerous because of their past criminal conduct by isolating these persons from society. If the criminal is imprisoned or executed, he cannot commit further crimes against society." *Id.* at 23-24 (footnotes omitted). Under the deterrence theory, "the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate." *Id.* at 24 (footnote omitted).

27. See NATIONAL INSTITUTE OF JUSTICE, *supra* note 25, at 6-7.

28. See Cavalier, *supra* note 23, at 609. The note quotes Justice Black from his opinion in the 1948 case of *Williams v. New York* 337 U.S. 241, 247 (1949). *Id.* Williams was found guilty of murder by a jury in New York. *Id.* at 242. "The jury recommended life imprisonment, but the trial judge imposed [sic] sentence of death." *Id.* "The judge gave reasons why he felt that the death sentence should be imposed." *Id.* at 244. The judge cited the defendant's criminal history and categorized him as a "menace to society." *Id.* The appellant brought a constitutional challenge averring that sentence was imposed without the benefit of due process. *Id.* at 252. The Supreme Court upheld the sentence reasoning that a judge must take into account "the defendant's life and characteristics," when imposing a sentence. *Id.* at 247.

29. SANFORD H. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 250 (1987). The author suggests that most people would agree that individualizing a sentence, which is accomplished through use of "indeterminate sentence[s], probation, and parole" is a worthwhile concept because it promotes the "moral commitment to the worth of an individual." *Id.*

30. See NATIONAL INSTITUTE OF JUSTICE, *supra* note 25, at 1. Habitual offender statutes constitute a determinate sentencing system, because they mandate a particular sentence for a particular crime and do not allow the judge any discretion. *Id.*

31. ARIZ. REV. STAT. ANN. § 13-604 (1994); ARK. CODE ANN. § 5-4-501 (Michie 1994); CAL. PENAL CODE § 667 (West 1994); COLO. REV. STAT. § 16-13-101 (1994); CONN. GEN. STAT. § 53a-40 (1994); DEL. CODE ANN. tit. 11, § 4214 (1993); D.C. CODE ANN. § 22-104a (1993); FLA. STAT. ch. § 775.084 (1994); GA. CODE ANN. § 17-10-7 (1993); HAW. REV. STAT. § 706-606.5 (1993); ILL. REV. STAT. ch. 720 para. 5/33B-1 (1994); IND. CODE § 35-50-2-8 (West 1994); IOWA CODE § 902.8 (1994); KAN. STAT. ANN. § 21-4504 (1993); KY. REV. STAT. ANN. § 532.080 (Michie/Bobbs-Merrill 1993); LA. REV. STAT. ANN. § 15:529.1 (West 1993); MD. ANN. CODE art. 27, § 643B (1993); MASS. GEN. LAWS ANN. ch. 279, § 25 (West 1994); MICH. COMP. LAWS ANN. §§ 769.10-.12 (West 1994); MISS. CODE ANN. §

not a life term.³² Other jurisdictions impose life terms with³³ and without the possibility of parole.³⁴ Some state legislatures have enacted habitual criminal laws that will increase jail time for the second felony conviction.³⁵ Other legislatures have determined that four felonies must first have been committed before mandatory extended jail terms take effect.³⁶ The statutes also vary in the types of crimes which must be committed before the habitual criminal statute is invoked by the prosecutor.³⁷ In some jurisdictions habitual criminal statutes have existed since the 1800s.³⁸

99-19-81, -83 (1993); MO. REV. STAT. § 558.016 (1993); MONT. CODE ANN. § 46-18-502 (1993); NEB. REV. STAT. § 29-2221, -2222 (1993); NEV. REV. STAT. § 207.010 (1993); N.J. REV. STAT. § 2C:44-3 (1994); N.M. STAT. ANN. § 31-18-17 (Michie 1993); N.Y. PENAL LAW §§ 70.06, 70.10 (McKinney 1994); N.C. GEN. STAT. § 14-7.6 (1993); OKLA. STAT. tit. 21, § 51 (1993); PA. CONS. STAT. ANN. § 9714 (1994); R.I. GEN. LAWS § 12-19-21 (1993); S.C. CODE ANN. § 17-25-45 (Law. Co-op 1991); S.D. CODIFIED LAWS ANN. §§ 22-7-7, -7-8, -7-8.1 (1994); TEX. PENAL CODE ANN. § 12.42 (West 1994); UTAH CODE ANN. §§ 76-8-1001, -1002 (1994); VT. STAT. ANN. tit. 13 § 11 (1993); WASH. REV. CODE § 9.92.090 (1994); W. VA. CODE § 61-11-18 (1993); WIS. STAT. § 939.62 (1994); WYO. STAT. § 6-10-201 (1993).

32. *See, e.g.*, HAW. REV. STAT. § 706-606.5 (1993) (imposing a mandatory minimum of six years and 8 months for a class A felony after one previous felony conviction and 13 years 4 months for a class A felony after two previous felony convictions); IND. CODE § 35-50-2-8 (1993) (sentences an habitual criminal to "an additional fixed term that is not less than the presumptive sentence for the underlying offense"); KAN. STAT. ANN. § 21-4504 (1993) (imposes a sentence of "not less than the least nor more than twice the greatest minimum sentence" after one previous felony conviction); W. VA. CODE § 61-11-18 (1993) (provides for an additional five years to be added on to the maximum indeterminate term of any habitual offender's sentence after one previous felony conviction).

33. *See, e.g.*, COLO. REV. STAT. § 17-22.5-104 (1994) (a person convicted as an habitual criminal under COLO. REV. STAT. § 16-13-101 and sentenced to a term of life imprisonment must serve at least 40 years before being eligible for parole).

34. *See, e.g.*, MD. ANN. CODE. art. 27, § 643B (1993) (a person convicted three times previously for a "crime of violence" shall be sentenced "to life imprisonment without the possibility of parole" for a fourth conviction).

35. *See, e.g.*, MO. REV. STAT. § 558.016 (1993) (defines a "prior offender" as one who has one previous felony conviction, and authorizes extended jail time upon the second conviction).

36. *See, e.g.*, S.C. CODE ANN. § 17-25-45 (Law. Co-op. 1991) (requires three previous felony convictions before imposing life imprisonment without parole upon the fourth felony conviction).

37. *Compare* ALA. CODE § 13A-5-9 (any three felony convictions are enough for the prosecutor to seek indictment under the habitual criminal statute) *and* D.C. CODE ANN. § 22-104a (1993) (a defendant can be sentenced to life imprisonment upon a third conviction for any felony) *with* FLA. STAT. ch. § 775.084 (1993) (there is a list of 11 felonies, which if committed subsequent to two or more felony convictions, that will allow the prosecutor to seek indictment under the habitual criminal statute).

38. *See, e.g.*, MASS. GEN. L. ch. 279, § 25 (1993) (first enacted in 1887); R.I. GEN. LAWS § 12-19-21 (1993) (first enacted in 1896); S.D. CODIFIED LAWS ANN. § 22-7-7 (1993) (first enacted in 1877); W. VA. CODE § 61-11-18 (1993) (first enacted in 1849).

Studies have been made regarding the costs of these statutes on the penal system.³⁹ Studies have also explored the effect of recidivist statutes on prison population.⁴⁰ It appears that habitual criminal statutes may not take as many criminals off the street as the general population desires.⁴¹

Habitual Offender Statutes are Our Answer to Reduce Crime

There are those who suggest that habitual criminal statutes are not cure-alls.⁴² Critics have contended that habitual offender statutes increase caseloads by reducing the number of plea bargains,⁴³ increase prison costs because of long term incarceration,⁴⁴ constitute cruel and unusual punish-

39. See, e.g., Siegler & Culliver, *infra* note 44 (discusses the cost on the operation of prisons in Alabama as a result of Alabama's habitual offender act). Life without parole inmates are more likely to try and escape. *Id.* at 5B. It costs anywhere from \$50-70,000 per cell to build new prisons, "and the maintenance cost was \$10,000 to \$15,000 per year." *Id.* "overall system costs are offset by low-cost minimum security facilities which cannot be used to house [life without parole] inmates, thereby increasing the cost per inmate for the system." *Id.*

40. *Id.*

41. See Berkman, *infra* note 68. The article indicates that only 92 felons have been jailed for life, without the possibility of parole, in Illinois over the last 15 years as a result of that state's habitual criminal statute. *Id.* The number of felons incarcerated as a result of a habitual offender statute is directly related to the broadness or narrowness of the statute. See *infra* notes 159-176 and accompanying text.

42. See Suddes, *supra* note 11, at 1A. The previous laws were known as "habitual criminal" laws and Ohio had one on the books until 1974 when legislators revised Ohio's criminal code. *Id.* Habitual criminal is just one of the many names that the courts and law makers have given to the class of individuals who repeatedly commit crimes. See Dubber, *supra* note 24, at 193. Other names used include: "recidivists, repeat offenders, habitual offenders, . . . persistent offenders, high-risk offenders, worst-risk offenders, dangerous offenders, dangerous special offenders, professional criminals, career criminals, career offenders, multiple offenders, . . ." *Id.* at 193-94.

43. See, e.g., Hallye Jordan, *Report: Three Strikes Would Increase Trials*, L.A. DAILY J., Mar. 1, 1994, at 3.

44. See Robert Siegler & Concetta Culliver, *Consequences of the Habitual Offender Act on the Costs of Operating Alabama's Prisons*, 52 FED. PROBATION 57 (June 1988). The article contained a study of the potential costs associated with Alabama's Habitual Offender Act because of the increase in "life without parole prisoners." *Id.* Researchers undertook the study because the habitual offender act "was adopted without the benefit of supporting research and with, at best, limited consideration of the potential consequences." *Id.* The authors theorized that the "[c]osts to the prison system can take two forms." *Id.* at 58. The more prisoners sentenced to life without parole, the more beds the prison system will need. *Id.* The beds, needed to house these prisoners who will grow old in prison, will have to come from "new construction or . . . reduction in the use of incarceration with milder offenders." *Id.* Habitual offenders may "create management problems" for the correctional facilities, thereby causing an increase in costs. *Id.* "[Life without parole] inmates have been shown to have higher levels of stress and depression, to become more hostile as life passes, and to experience more illness. Thus, the medical and psychological services needed will be greater

ment,⁴⁵ and violate both the double jeopardy and *ex post facto* clauses of the constitution.⁴⁶ One commentator has suggested that recidivist statutes do not perform the functions the legislature intended.⁴⁷ A study completed by the National Institute of Justice suggests that recidivist statutes do not work because "justice actors" do not apply the statutes properly.⁴⁸ Victims have protested against the use of "three strikes" laws by refusing to testify against defendants.⁴⁹ Judges have also found a way around "three strikes" laws by reducing the charges against a defendant.⁵⁰

than those of the normal prison population." *Id.* at 59 (footnotes omitted). The study concluded that "the costs of maintaining the act are high." *Id.* at 63. Even though habitual offenders are being incarcerated for life, there is not a finite number of them, and there is always an habitual offender to replace the offender that has just been jailed. *Id.* at 63-64.

45. See, e.g., Elizabeth M. Mills, *Eighth Amendment-Cruel and Unusual Punishment: Habitual Offender's Life Sentence Without Parole is Disproportionate*, 74 J. CRIM. L. & CRIMINOLOGY 1372 (1983) (discussing the Supreme Court's decision in *Solem v. Helm*, 103 S. Ct. 3001, which held that sentencing a defendant to life in prison without the possibility of parole for passing a \$100 "no account" check was disproportionate and therefore violated the Eighth Amendment, even though the sentencing complied with South Dakota's recidivist statute).

46. Nancy Canonico, Note, *Habitual Criminal Statute 12.42(d) - Open Door to Disproportionate Sentences*, 29 BAYLOR L. REV. 629 (1977). Habitual offender statutes have withstood the constitutional challenges against them to date and it is probably not worthwhile to challenge a recidivist statute on these grounds. *Id.*

47. Daniel Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFF. L. REV. 99, 105 (1971). "[T]hese statutes, characterized by indefensible harshness, serve neither to deter potential recidivists nor to protect the public by isolating offenders who are truly dangerous." *Id.*

48. See NATIONAL INSTITUTE OF JUSTICE, *supra* note 25, at 6-35 (discussing the problems inherent with habitual offender statutes). Those problems include: statutes which are poorly defined and too broad, statutes which are arbitrarily imposed and statutes which are not used as intended but are used as plea bargaining tools. *Id.*

49. Charles Finnie, *Victim Protests Against Use of 'Three Strikes'*, L.A. DAILY J., Apr. 25, 1994, at 1. Seventy-one year old Joan Miller refused to testify against the man who broke into her car because she was opposed to California's "three strikes" statute. *Id.* She did not want to see the defendant, who had 11 prior felony convictions, incarcerated for 25 years to life. *Id.*

50. Charles Finnie, *Judge Reduces Charge, Avoids 'Three Strikes'*, L.A. DAILY J., Apr. 28, 1994, at 1. The judge reduced the charge against the defendant from a felony to a misdemeanor. *Id.* The defendant was on parole when police apprehended him while breaking into a car. *Id.* After the judge reduced the charge, the maximum jail term the defendant could serve was one year, compared to twenty-five years to life had the defendant been found guilty under the habitual criminal law. *Id.* "[J]udges . . . have found slick ways to short-circuit the law." Marc Peyser, with Donna Foote, *Strike Three, You're Not Out*, NEWSWEEK, Aug. 29, 1994, at 53. A California judge reduced a felony charge to a misdemeanor, for a man who would have faced his third strike for shoplifting \$75 worth of goods. *Id.* Another California judge "ordered two prior felony convictions dropped because the defendant possibly faced life in prison for stealing a beer from a 7-Eleven" *Id.* "[M]any [district attorneys], especially the more liberal and/or overworked ones are finding 'wiggle room' in the law, classifying certain crimes

Many different groups and individuals have voiced their opinions regarding the negative effect of habitual offender statutes, including the Ohio Bar Association,⁵¹ the American Bar Association (ABA),⁵² the American Civil Liberties Union (ACLU),⁵³ the National Legal Aid and Defender Association,⁵⁴ and the Judicial Conference of the United States.⁵⁵

Some believe that a "three strikes" statute would cause the prisons to be filled with "prisoners in their 60's and 70's" who are no longer dangerous to society.⁵⁶ Others believe that habitual offender statutes violate the Eighth Amendment of the United States Constitution because the statutes impose a sentence which is disproportionate⁵⁷ to the

that straddle the felony-misdemeanor line as misdemeanors." *Id.*

51. See *McInnis & Candisky*, *supra* note 1, at 1A.

52. See, e.g., William J. Eaton, '3-Time Loser' Bill a Political Winner, but Critics Abound, L.A. TIMES, Jan. 25, 1994, at 24 (the American Bar Association does not approve of "mandatory minimum sentences"). Leslie Phillips, *Next ABA Boss: Legalize Drugs Says It's Way to Reduce Crime*, USA TODAY, June 28, 1994, at 2A (George Bushnell, the president-elect of the ABA, believes that three strikes legislation "is a 'glitzy political response to the fear that grips our country'"). James Podgers, *Tackling Crime in the Streets: ABA Summit Identifies Issues to Foster Strategies Against Violence*, 80 A.B.A. J. 104 (Mar. 1994) (current ABA president R. William Ide III "warned against the 'quick-fix frenzy that has grabbed our political leadership'"). Joseph Calve, *The Image Enhancer*, THE CONN. L. TRIBUNE, Feb. 28, 1994, at 35 (Ralph Gregory Elliot, a Hartford lawyer, says that "three strikes" legislation is "quite likely bad policy").

53. See *Suddes*, *supra* note 11, at 1A. "The American Civil Liberties Union of Ohio strongly opposes [the "three strikes bill being proposed in Ohio], saying there's no proof that three-strike laws improve public safety and that the law could disproportionately penalize black defendants". *Id.*

54. See *Eaton*, *supra* note 52, at 24. Scott Wallace, special counsel to the National Legal Aid and Defender Association, believes that if a "three strikes" law is enacted there will be many more convicts growing old in prison. *Id.*

55. Henry J. Reske, *Three Strikes a Hot Potato: Judicial Conference Says Its Crime Bill Stance Misinterpreted*, 80 A.B.A. J. 30 (June 1994). "The judiciary has opposed mandatory minimum sentences . . . including . . . mandatory life sentences for persons convicted of a third felony offenses." *Id.*

56. Jim Dettling, *Slaby, Sawyer Differ on '3 Strikes' Concept Rivals Take Opposing Views on Life Sentence for Repeat Felony Offenders*, AKRON BEACON J., Apr. 6, 1994, at D2. Ed Marek, a public defender for Northern Ohio, said that many studies have shown that people over the age of 60 do not commit many crimes. *Id.* See also Carolyn Skorneck, *3 Strikes Crime Bill Passes Committee House Judiciary Plan Would Allow Early Release for Old, Harmless Inmates*, AKRON BEACON J. Mar. 18, 1994, at A4. Rep. Jerrold Nadler, a Democratic congressman from New York, has proposed an amendment to the national crime bill that would allow the courts to free a prisoner over the age of seventy who had served 30 years of his life sentence, as long as the prisoner no longer presented a risk to society. *Id.*

57. See, e.g. *Cavalier*, *supra* note 23, at 621 (discussing the four factors used by the Fourth Circuit employed in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974), to determine whether or not a sentence is disproportionate). The court looked first at the "nature of the offense itself." *Hart*, 483 F.2d at 140. A second factor used by the court

offense.⁵⁸ Some argue that recidivist statutes may be class biased.⁵⁹ As legislatures around the country renew their interests in habitual offender laws, those who disdain the statutes argue that the statutes take away a judge's discretion in sentencing⁶⁰ and create a class of criminals "with nothing to lose."⁶¹

However, for all of the negative comments which can be found regarding habitual offender statutes, there are many people who support the legislation. The general public overwhelmingly favors "three strikes" legislation.⁶² Both groups and individuals have endorsed a habitual criminal statute in Ohio; the Ohio State Bar Association's governing board,⁶³

was the "legislative purpose behind the punishment." *Id.* at 141. A third factor used by the court is the "comparison of [the] punishment with how [the defendant] would have been punished in other jurisdictions." *Id.* The final factor the court used was to compare the "punishment available in the same jurisdiction for other offenses . . ." *Id.* See also *infra* notes 71-73 (discussing the U.S. Supreme Court's decisions in *Parke v. Raley*, *McDonald v. Massachusetts*, and *Graham v. West Virginia*).

58. Nancy L. Marshall, *The Constitutional Infirmities of Indiana's Habitual Offender Statute*, 13 IND. L. REV. 597, 612 (1980). One of the arguments proffered is that imposing a punishment on a habitual offender greater than that imposed on a non-habitual offender amounts to imposing a disproportionate sentence. *Id.* at 616. See also Thomas P. Ott, *Constitutional Criminal Law -- Sentencing -- Mandatory Sentencing Statute Requiring Life Imprisonment Without Parole for Habitual Offenders of Violent Crimes Satisfies the Eighth Amendment's Proportionality Principle When Applied to a Fourth Conviction of Daytime Housebreaking*, 17 U. BALT. L. REV. 572 (1987-1988) (discusses *State v. Davis*, 530 A.2d 1223 (Md. 1987), in which the defendant challenged a Maryland recidivist statute on the grounds that a sentence of life imprisonment was disproportionate).

59. See, e.g., NATIONAL INSTITUTE OF JUSTICE, *supra* note 25, at 9 (discussing the fact that there are no provisions in repeat offender laws to deal with "white collar" crime and therefore recidivist statutes may be class biased).

60. See, e.g. James Bradshaw, *3-Strikes Plan Full of Pitfalls, Moyer Warns*, COLUMBUS DISPATCH, Feb. 17, 1994, at 1C (discussing Ohio Chief Justice Thomas Moyer's opinion that mandatory sentencing does not leave the judge discretion).

61. The New York Times, *"Three Strikes" May Be Harder Than Intended Law for Habitual Criminals Produces New Difficulties*, SEATTLE POST-INTELLIGENCER, Feb. 15, 1994, at A1 (discussing, in part, police and prosecutors worries that habitual offender statutes could create a class of criminals "with nothing to lose" and therefore the criminals may tend to use violence against an arresting officer).

62. See, e.g., McInnis & Candisky, *supra* note 1, at 1A ("A thug in prison cannot shoot your sister," said state Rep. Gene Krebs, . . . [who] introduced House Bill 572, one of several proposed three strikes bills). Robert Hoiles, *Authorities Like 3 Strikes Plan; Lawmakers, Police Say Proposal, Which Locks Up 3-Time Offenders for Life Without Parole, Wouldn't Affect Prison Costs Much Until 2005 But Gets Career Felons Off the Streets*, AKRON BEACON J., Feb. 21, 1994, at C1 ("Recent polls show that 80 percent of Americans favor a three-strikes law."). David S. Broder, *1 Million Wasted Lives*, PLAIN DEALER (Cleveland), Apr. 17, 1994, at 3C (three strikes legislation is what the people want). *Three Strikes You're Out*, PLAIN DEALER (Cleveland), Feb. 20, 1994, at 2C ("Society has grown tired of returning violent criminals to the streets, only to see them engage in more lawbreaking.").

63. See McInnis & Candisky, *supra* note 1, at 1A. The board sanctions three strikes

law enforcement officials,⁶⁴ the citizens of Ohio,⁶⁵ and the governor of the state.⁶⁶

It seems as if the general populace and their elected officials support habitual criminal statutes, while those associated with the courts and the judiciary do not.⁶⁷ The citizenry approves of the habitual criminal statutes because there is a public perception that judges are too lenient on criminals, and mandatory life terms are needed to get career criminals off the street.⁶⁸

Keeping habitual offenders off the streets and deterring crime will safeguard the potential victims of repeat offenders. The system is not working when people like Richard Allen Davis are freed to kill.⁶⁹ Let us get habitual criminals off the streets, by enacting laws designed to do so. There may be many reasons for not enacting a habitual offender statute, however, the reasons against the statute are greatly outweighed if the statute saves someone's life.

Recidivist rates are estimated to be between 60-70% nationally.⁷⁰ A study performed by the Department of Justice in 1983 indicated the recidivism rate was 62.5%.⁷¹ Many of the prisoners who are released have been arrested

legislation as long as it is "narrowly defined". *Id.* See also Hoiles *supra* note 62, at C1 ("[T]he three-strikes proposal . . . should be studied so 'the penalty isn't the same for a third strike for burglary where no one is home as it is for murder,'" according to Dennis Whalen of the Ohio State Bar Association).

64. See Hoiles, *supra* note 62, at C1. Akron Police Chief Larry Givens is a proponent of "three strikes" legislation, "putting them behind bars for life would help to reduce crime". *Id.* Chief Givens believes the criminals who would be incarcerated under a "three strikes" law are the kind of criminals "who have a tremendous impact on crime". *Id.*

65. See Ludlow, *infra* note 140, at 1A. "Seventy-nine percent [of Ohioans polled by the University of Cincinnati] favor 'Three Strikes and You're Out' legislation that would sentence violent third-time felons to life imprisonment." *Id.*

66. See Suddes, *supra* note 11, at 1A. "Republican Gov. George V. Voinovich supports the 'three-strikes' concept" but "sees [it] as only one facet of an overall anti-crime package, not as a 'magic bullet.'" *Id.* Billy Inmon, who is running against Governor Voinovich in the upcoming gubernatorial election, endorses the "three strikes concept" but does not see it as a "long-term solution to the crime problem." *Id.*

67. See *supra* notes 62-66 and accompanying text.

68. See Harvey Berkman, *Few Felons Out in Three Strikes*, NAT'L L. J., Feb. 28, 1994, at 3. "The average murderer now spends 5.5 years in prison, and the average rapist 3 years - that is a national scandal." *Id.*

69. See Sonenshine, *supra* note 5, at A1.

70. See Pell, *infra* note 141, at 13A.

71. See Beck, *infra* note 141, at 1. The rearrest rate was 62.5%, while the rates for reconviction and reincarceration were somewhat lower, 46.8% and 41.4% respectively. *Id.* Within three years of release the average inmate was rearrested an average of 4.8 times. *Id.* Over 22% of those released were rearrested for "violent offenses" within three years of their release. *Id.*

more than 3 times prior to their release.⁷² The question that should be asked by the American people is: How many Polly Klaases must there be before these types of criminals do not go free.

One of the most telling facts uncovered in the Department of Justice study on recidivism was: *the longer the prison term served by the prisoner prior to release, the less likely that person was to be rearrested.*⁷³ Other factors which strongly influence recidivist rates are, "the number of prior arrests, the age when released, and the age when first arrested."⁷⁴ The more times that a releasee had been previously arrested, the more likely the releasee was to be rearrested.⁷⁵ Generally, the younger the offender was when the correctional system released him/her the more likely the offender was to be rearrested.⁷⁶ Recidivist rates are highest for those who were arrested at an early age.⁷⁷

Habitual offender statutes by their very nature should reduce the amount of crime by taking criminals off of the street.⁷⁸ As previously suggested, habitual criminal statutes do not create a crime-free society but they are the

72. *Id.* at 7. Over 69% of those released had greater than three prior arrests. *Id.* Over 44% had been arrested *more than seven times* previously. (emphasis added) *Id.*

73. *Id.* at 9. "[T]he prisoners who had served the longest, the estimated 4.1% who had been in prison for more than 5 years, had lower rates of rearrest during the 3-year follow-up period." *Id.* "An estimated 48.3% of those who had served more than 5 years in prison were rearrested, compared to 59.0% or more of those who had served less time." *Id.*

74. *Id.* at 10.

75. *Id.* at 7. "Recidivism rates were strongly related to the number of prior adult arrests: the more extensive a prisoner's prior arrest record, the higher the rate of rearrest after release from prison." *Id.* "Nearly 75% of the prisoners with 11 to 15 prior arrests and 82.2% of those with 16 or more prior arrests were arrested again following their release from prison." *Id.* "In contrast, among those prisoners who had one previous arrest . . . approximately 38.1% were rearrested within 3 years." *Id.*

76. *Id.* at 5. "Recidivism was inversely related to the age of the prisoner at the time of release: the older the prisoner, the lower the rate of recidivism. More than 75% of those age 17 or younger when released from prison were rearrested, compared to 40.3% of those age 45 or older." *Id.* "The largest declines in recidivism were found among prisoners age 35 or older, but even those age 45 or older had rearrest rates of 40%." *Id.*

77. *Id.* at 8.

The age at which a released prisoner was first arrested and charged as an adult was inversely related to recidivism: the younger the age at first arrest, the higher the rate of recidivism. An estimated 72.2% of the prisoners first arrested before the age of 18 were rearrested within 3 years of their release, compared to 39.2% of those arrested between age 25 and 29 and 26.6% of those arrested at age 30 or older.

Id. Other studies have found analogous results, the younger the age at first arrest, the more likely that person is to become a repeat offender. See, e.g., MARVIN E. WOLFGANG, ROBERT M. FIGLIO, AND THORSTEN SELLIN, *DELINQUENCY IN A BIRTH COHORT* (1972); ALLEN J. BECK, *RECIDIVISM OF YOUNG PAROLEES* (1987).

78. See, e.g., Bayley, *supra* note 16, at 524.

best that we have now.⁷⁹ The statutes do not compromise the rights of habitual criminals and they could save a life. When one life is saved, the drawbacks of habitual criminal statutes are inconsequential.

Habitual criminal statutes must be "tough" enough to keep persistent felons off of the streets. In determining whether a habitual offender statute is "tough" enough, "tough" must first be defined. Much of the general public feel that "tough" means incarcerating those people who repeatedly commit crimes.⁸⁰ As previously discussed, American citizens overwhelmingly favor "Three Strikes and You're Out" legislation.⁸¹ The populace is tired of seeing criminals released from prisons, only to be rearrested for another crime.⁸² American's want to keep these criminals off the streets and they support legislation that accomplish this.⁸³

The toughness of the statute can be measured in terms of public policy and case law. Policy and law collide when the legislature passes a statute that is too harsh on criminals. The public wants criminals incarcerated but this desire must be balanced with the rights of the accused.⁸⁴ A criminal has rights and no law shall be made which would abridge those rights.⁸⁵

Constructing a Habitual Criminal Statute

Like any statute, a habitual offender statute is only effective when it is well written.⁸⁶ There are four elements to a habitual offender statute:

79. See *supra* notes 42-61 and accompanying text.

80. *Three Strikes You're Out*, PLAIN DEALER (Cleveland), Feb. 20, 1994, at 2C. "Society has grown tired of returning violent criminals to the streets, only to see them engage in more law breaking. That's why measures like 'three strikes' are popular." *Id.*

81. See Ludlow, *supra* note 140, at 1A. "Seventy-nine percent [of Ohioans polled by the University of Cincinnati] favor 'Three Strikes and You're Out' legislation that would sentence violent third-time felons to life imprisonment." *Id.*

82. See Berkman, *supra* note 68. "The average murderer now spends 5.5 years in prison, and the average rapist 3 years – that is a national scandal." *Id.*

83. See *Three Strikes You're Out*, *supra* note 80 and accompanying text.

84. *Repeat Violent Offenders Get a Break in Ohio Law*, COLUMBUS DISPATCH, Nov. 8, 1993, at 6C. "There are some people – some really, really bad people – who need to be put in prison for a very long time, and often, that . . . doesn't happen," according to David Diroll, executive director of the Ohio Criminal Sentencing Commission. *Id.* (alterations in original).

85. See, e.g., U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. amend. V ("nor shall any person be subject for the offence to be twice put in jeopardy of life or limb;"); U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

86. See McInnis & Candisky, *supra* note 1, at 1A. According to U.S. Attorney Edmund A. Sargus Jr., "Whether a third-offender law will solve [the repeat offender problem] depends on how it is written." *Id.*

"seriousness, repetitiveness, intensity, and dangerousness."⁸⁷ To be well defined a habitual offender statute must establish exactly what class of people it hopes to deter.⁸⁸

A habitual offender statute can be broad or narrow.⁸⁹ The Ohio Bar Association supports the habitual offender statute being proposed in Ohio, as long as the statute is narrowly defined.⁹⁰ A narrow habitual offender statute will cause some criminals to be incarcerated, but it usually contains a relatively small list of crimes.⁹¹ An example of a narrow habitual criminal statute is the one passed by the Illinois Legislature.⁹²

A broad habitual offender statute is one that will cause many criminals to be incarcerated.⁹³ An example of a broad habitual criminal statute is the one

87. NATIONAL INSTITUTE OF JUSTICE, *supra* note 25, at 7.

Seriousness refers to the gravity of the crime(s) committed. Repetitiveness refers to the number of crimes committed over an offender's career (without regard to the time interval between the offenses). Intensity refers to the rate of criminal activity over a unit of time (such as one year).

In contrast, dangerousness does not refer to the quality, number or intensity of particular criminal acts committed by an offender but rather it refers to a prediction that the offender may do serious criminal mischief to the community in the future.

Id.

88. See NATIONAL INSTITUTE OF JUSTICE, *supra* note 25, at 9.

89. A broad habitual offender statute would contain a lengthy list of crimes within its scope. A broad statute would punish criminals as habitual offenders after only one or two previous convictions. A broad statute would not limit the criminal activity to a particular time span (i.e. – only apply to felony convictions within the last ten years). A narrow statute would contain only a small list of crimes within its scope. A narrow statute would only take effect after a large number of previous felony convictions. A criminal would only be subject to a narrow statute if the prior felony convictions were fairly recent (i.e. – committed within the last five years).

90. See Hoiles, *supra* note 62, at C1.

A spokesman for the Ohio State Bar Association said there is concern that the three-strikes proposal could be overly broad, netting some people who are not violent offenders.

"The debate is at what level and what past conduct you mandate this type of sentence," said Dennis Whalen of the bar association. We are concerned about . . . needless incarceration. You have a laundry list of let's-get-tough-on-crime bills, which may do some good, but they are piecemeal solutions when you pass them one by one, and you could create an imbalance.

He said the bar association is not against the three-strikes proposal, but said it should be studied so the "penalty isn't the same for a third strike for a burglary where no one is home as it is for a murder."

Id. (alterations in original).

91. See, e.g., ILL. REV. STAT. ch. 720 para. 5/33B-1 (1994), *infra* note 160.

92. *Id.*

93. See *infra* notes 157-73 and accompanying text.

enacted by the Alabama Legislature.⁹⁴ The Illinois statute is narrower than the Alabama statute because the prior felony convictions in Illinois must be one of the enumerated felonies, while in Alabama the prior felony convictions can be for any felony.⁹⁵ The Illinois statute is actually broader than the Alabama statute in one respect, three previous felony convictions are required in Alabama, while only two are required in Illinois.⁹⁶ The general public would favor a broad statute because it would take more criminals off the street.⁹⁷

A well constructed statute will withstand a constitutional challenge. The Supreme Court has heard many challenges to habitual criminal statutes throughout the years.⁹⁸ In 1938, the Supreme Court said that “[p]ersistence in crime and failure of earlier discipline effectively to deter or reform justify more drastic treatment.”⁹⁹ The statutes have been challenged on the grounds that they violate the *ex post facto* provision of the First Amendment to the U.S.

94. See ALA. CODE § 13A-5-9, *infra* note 164 and accompanying text.

95. Compare ILL. REV. STAT. ch. 720 para. 5/33B-1 (1994), *infra* note 160 with ALA. CODE § 13A-5-9, *infra* note 164.

96. Compare ILL. REV. STAT. ch. 720 para. 5/33B-1 (1994), *infra* note 160 with ALA. CODE § 13A-5-9, *infra* note 164.

97. See Ludlow, *supra* note 140, at A1.

98. Parke v. Raley, 113 S. Ct. 517, 522 (1992). The petitioner brought suit challenging the constitutionality of Kentucky’s habitual offender statute. *Id.* at 518. The petitioner claimed that the statute was unfair because it placed the burden of proof on the defendant to show that previous convictions were invalid. *Id.* at 521. The Supreme Court held that the “Due Process Clause permits a state to impose a burden of production on a recidivism defendant who challenges the validity of a prior conviction.” *Id.* at 525-26. “[W]e have repeatedly upheld recidivism statutes ‘against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities.’” *Id.* “‘Tolerance for a spectrum of state procedures dealing with [recidivism] is especially appropriate’ given the high rate of recidivism and the diversity of approaches that States have developed for addressing it.” *Id.* at 522 (alterations in original).

99. Commw. of Pa. *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 54-55 (1937). A prisoner escaped from a Pennsylvania penitentiary and upon his recapture, the court sentenced him to a term “not exceeding his original sentence.” *Id.* at 52. The Pennsylvania law reads in part that

[I]f any prisoner imprisoned in any penitentiary . . . upon a conviction for a criminal offense . . . shall break such penitentiary . . . such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence.

Id. at 52-53 (alterations in original). The petitioner claims that the sentence amounted to a denial of equal protection. *Id.* The petitioner argued that if two prisoners broke out of prison at the same time, and the authorities recaptured them, under the Pennsylvania law they would be sentenced to different prison terms. *Id.* at 53. The Supreme Court upheld the law as valid. *Id.* at 55. The Supreme Court reasoned that the States had the responsibility for making laws to “protect itself.” *Id.* at 54 “[A] State may choose means to protect itself and its people against criminal violation of its laws.” *Id.*

Constitution.¹⁰⁰ The statutes have been challenged by those who believe they violate the double jeopardy clause to the Constitution.¹⁰¹ Petitioners have brought challenges before the Supreme Court on the grounds that habitual offender statutes confer disproportionate sentences on the criminal and therefore constitute cruel and unusual punishment, a violation of the Eighth Amendment to the U.S. Constitution.¹⁰² Challenges have been brought against recidivist statutes on the grounds that they violate the 14th Amendment of the U. S. Constitution, because the statutes are "selectively" enforced.¹⁰³

The only challenge against the constitutionality of habitual offender statutes which the Supreme Court upheld can be found in *Solem v. Helm*.¹⁰⁴

100. *McDonald v. Massachusetts*, 180 U.S. 311, 313 (1900). The defendant in this case challenged the constitutionality of Massachusetts habitual criminal act on the basis that the act imposed a penalty for crimes which the defendant had already been convicted of and therefore the act violated the *ex post facto* clause of the First Amendment. *Id.* at 312. The Supreme Court held that the statute did not impose a penalty on the past crimes. *Id.* "The statute under which it was rendered is aimed at habitual criminals; and simply imposes a heavy penalty upon conviction of a felony committed . . . by one who had been twice convicted The punishment is for the new crime only, but is the heavier if he is an habitual criminal." *Id.*

101. *Graham v. West Virginia*, 224 U.S. 616, 631 (1912). The petitioner challenged the West Virginia habitual criminal statute on the grounds that it violated the 5th and 14th Amendments to the U.S. Constitution. *Id.* at 621. The Supreme Court struck down constitutional challenges to West Virginia's recidivist statute. *Id.*

What has been said, and the authorities which have been cited, sufficiently show that there is no basis for the contention that the plaintiff in error has been put in double jeopardy or that any of his privileges or immunities as a citizen of the United States have been abridged. Nor can it be maintained that cruel and unusual punishment has been inflicted.

Id. See also *Moore v. Missouri*, 159 U.S. 673, 677 (1895) (the Court upheld a Missouri habitual offender statute in the face of double jeopardy and cruel and unusual punishment challenges, reasoning that "by [the defendant's] persistence in the perpetration of crime, he has evinced a depravity, which merits a greater punishment").

102. *Graham*, 224 U.S. at 631. "Nor can it be maintained that cruel and unusual punishment has been inflicted." *Id.*

103. *Oyler v. Boles*, 368 U.S. 448, 454-56 (1962). A West Virginia court found the defendant guilty of second degree murder, an offense which carries with it a sentence of 5 to 18 years. *Id.* at 449. The prosecution filed an information and presented evidence that the defendant had been previously convicted of three felonies in Pennsylvania. *Id.* at 449-50. The court sentenced the defendant to life imprisonment under West Virginia's habitual criminal statute. *Id.* at 450. Petitioner claimed that the prosecutor did not prosecute all persons with three previous felony convictions as habitual offenders. *Id.* at 454-55. Therefore, those who were prosecuted under the habitual offender act were discriminated against and "denied the equal protection of law guaranteed by the Fourteenth Amendment." *Id.* at 454. The court held that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" and affirmed West Virginia's selective use of the habitual offender statute. *Id.* at 456.

104. *Solem v. Helms*, 463 U.S. 277 (1983). In *Solem*, South Dakota invoked its recidivist statute on Helms and sentenced him to life imprisonment for writing a "no account" check. *Id.*

The Supreme Court's decision in *Solem* did not weaken habitual criminal statutes.¹⁰⁵ In fact, Chief Justice Rehnquist and Justice Scalia in *Harmelin v. Michigan*, recently argued that *Solem* should be overruled.¹⁰⁶ A majority of the Justices, however, reasoned that *Solem* was good law.¹⁰⁷

The court held "that a criminal sentence must be proportionate to the crime for which the defendant has been convicted," and overturned the sentence. *Id.* at 289.

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of the Magna Carta were devoted to the rule that [fines] may not be excessive. And the principle was repeated and extended in the First Statute of Westminster. These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments.

Id. at 284-85 (footnotes omitted). "Although the precise scope of [the Eighth Amendment's Excessive Bail Clause] is uncertain, it at least incorporated 'the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.'" *Id.* at 285.

105. See *infra* notes 106 and accompanying text.

106. *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991). A Michigan Court found the defendant guilty of possessing 672 grams of cocaine and sentenced him to a mandatory term of life imprisonment. *Id.* at 2684. "Justice Scalia announced the judgement of the Court and delivered the opinion of the Court with respect to Part V, in which Chief Justice Rehnquist and O'Connor, Kennedy, and Souter, Justices joined, and opinion with respect to Parts I, II, III, and IV, in which the Chief Justice joins." *Id.* at 2684. Part IA of the opinion contains Justice Scalia's assertion that *Solem* should be overruled. *Id.* at 2686. "It should be apparent . . . that our 5-to-4 decision eight years ago in *Solem* was scarcely the expression of clear and well accepted constitutional law." *Id.* Justice Scalia reasoned that the Eighth Amendment "contains no proportionality guarantee." *Id.* Justice Scalia based his reasoning on the premise that the Court's two previous proportionality review cases rejected the use of "objective factors". *Id.* Justice Scalia used the standard arguments for overruling a case. *Id.* Justice Scalia argued that the decision in *Solem* "was simply wrong", the decision in *Solem* was 5-4 and that adherence to "the doctrine of *stare decisis* is less rigid in its application to constitutional precedents." *Id.* Justice Scalia also discussed the history of the Cruel and Unusual Punishment Clause and why there should be no proportionality review based on that history. *Id.* at 2686-99. In fact, Justice Scalia believed that the *Solem* Court did not do sufficient research into the history of cruel and unusual punishment and that is why it's holding was erroneous. *Id.* at 2686. "*Solem* discussed [the history of the Eighth Amendment] in only two pages." *Id.* (emphasis added). Some commentators have suggested that Justice Scalia did not base his opinion, in *Harmelin*, on "sound constitutional" principles. Olivia O. Singletary, Comment, *Harmelin v. Michigan: The Most Recent Casualty in the Supreme Court's Struggle to Develop a Standard for Eighth Amendment Proportionality Review*, 54 OHIO ST. L. J. 1205, 1247 (1993). "[T]he source of the Supreme Court's decision was probably not sound constitutional analysis nor careful consideration of the constitutionally guaranteed rights under the Eighth Amendment." *Id.* The Court placed greater weight on society's growing concern about drugs. *Id.*

107. *Id.* at 2702 (Kennedy, J. concurring). Justices Kennedy, O'Connor and Souter concurred in the opinion of the Court but reasoned that there is a place for proportionality review. *Id.* "The proper role for comparative analysis of sentences, then, is to validate an initial judgement that is grossly disproportionate to a crime. This conclusion neither 'eviscerate[s]' *Solem*, nor 'abandon[s]' its second and third factor . . ." *Id.* at 2707 (alterations in original). Justices White, Blackmun and Stevens dissented, reasoning that "the *Solem* analysis has worked well in practice." *Id.* at 2712 (White, J. dissenting). Justice Marshall

In reaching its decision in *Solem*, the Court distinguished a case decided only three years earlier.¹⁰⁸ In *Rummel v. Estelle*, the Court refused to overturn a sentence of life imprisonment dictated by a Texas recidivist statute.¹⁰⁹ The Court distinguished *Solem* and *Rummel* because Rummel was eligible for parole and Helms was not, though some commentators have questioned this reasoning.¹¹⁰

The Supreme Court's decisions have not weakened habitual criminal statutes and states continue to enact them or modify existing statutes.¹¹¹ Washington's statute, amended in 1992,¹¹² provides that a criminal may be subject to life imprisonment for stealing \$337 from a street vendor.¹¹³ Critics complain that sentencing a felon to life in prison without the possibility

agreed with all of Justice White's dissent except for a portion regarding the death penalty. *Id.* at 2719 (Marshall, J., dissenting).

108. See *Rummel v. Estelle*, 445 U.S. 263 (1980).

109. *Id.* Rummel had been previously found guilty in Texas of fraudulent use of a credit card (\$80) and passing a forged check (\$28.36). *Id.* at 265-66. Rummel was charged with felony theft in 1974, having "obtain[ed] \$120.75 by false pretenses." *Id.* at 266. The charge carries with it a prison term of two to five years. *Id.* A Texas court sentenced the petitioner to life imprisonment under Texas' recidivist statute. *Id.* at 264. Rummel challenged the statute averring that the mandatory sentence imposed by the statute was "grossly disproportionate." *Id.* Rummel "claimed . . . that his life sentence was so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment." *Id.* at 267. The Supreme Court upheld the sentence as constitutional. *Id.* at 285.

The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.

Id. at 284-85.

110. Elizabeth M. Mills, *Eighth Amendment – Cruel and Unusual Punishment: Habitual Offender's Life Sentence Without Parole is Disproportionate*, 74 J. CRIM. L. & CRIMINOLOGY 1372, 1378 (1983). "[T]he Court's attempt to distinguish *Helm* from *Rummel* on the basis that Helm was sentenced to life without parole is formalistic and not consistent with the Court's recent treatment of parole and commutation." *Id.* at 1372.

111. See, e.g., 1994 Cal. Legis. Serv. Ch. 12 (A.B. 971) (West) (an amendment to California's criminal code to "ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses"); 1994 Colo. Legis. Serv. S.B. 94-196 (West) (an act which permits the courts to imprison a violent felony offender for life if that offender has been twice previously convicted of violent felonies).

112. WASH. REV. CODE § 9.29.090 (1993). The law was amended in 1992. *Id.*

113. Richard Seven, *New 'Three-Strikes' Law About to be Tested in King County*, SEATTLE TIMES, Feb. 7, 1994, at B3. The defendant in this case has three previous convictions, including two for attempted robbery and one for second degree assault. *Id.*

of parole for such a "small" indiscretion is inequitable.¹¹⁴ Ohio is another state that appears on the verge of enacting a habitual offender statute.¹¹⁵

OHIO'S HABITUAL CRIMINAL STATUTES

Past Statutes

The first habitual criminal statute in Ohio appeared on the books in 1885.¹¹⁶ According to the statute, if a person committed a felony and that person had previously been convicted of a felony on two other occasions, then he/she would be sentenced to life imprisonment.¹¹⁷ In 1885, a felony was defined as an "offense which may be punished by death, or imprisonment in the penitentiary."¹¹⁸ Therefore, the first habitual offender statute covered a wide variety of crimes.¹¹⁹ The statute allowed for parole only after the defendant had served the full term for the actual crime committed.¹²⁰ The legislature repealed this statute in 1902 without providing a reason.¹²¹

114. Christy Scattarella, *Suspect in Espresso Stand Robbery May Face '3rd Strike'*, SEATTLE TIMES, May 26, 1994, at B3. "Critics of the statute say it is too broad, lumping small-time crooks with murders and serial rapists." *Id.*

115. See *supra* note 11, at 1A.

116. 82 LAWS OF OHIO 236 (1885).

117. 2 FLORIEN GIAUQUE, REVISED STATUTES OF OHIO, 1815-1816 (7th ed., 1896). Section 7436-10 of the Revised Statutes of Ohio read as follows:

Every person who, after having been twice convicted, sentenced and imprisoned in some penal institution for felony, whether committed heretofore or hereafter, and whether committed in this state or elsewhere within the limits of the United States of America, shall be convicted, sentenced and imprisoned in the Ohio penitentiary for felony hereafter committed, shall be deemed and taken to be an habitual criminal, and on the expiration of the term for which he shall be so sentenced, he shall not be discharged from imprisonment in the penitentiary, but shall be detained therein for and during his natural life . . . he may, in the discretion of the board of managers, be allowed to go upon parole outside the buildings and enclosures.

Id.

118. GIAUQUE, REVISED STATUTES OF OHIO, *supra* note 117, § 6795 at 1673.

119. GIAUQUE, *supra* note 117, at 1682-1734. Among the crimes considered felonies at the time of the first habitual offender statute were: attempting to procure an abortion (§ 6815), burning personal property valued at more than \$35.00 (§ 6833), intent to commit burglary (§ 6835), embezzlement by public officials (§ 6841), dueling (§ 6887), bribing public officials (§ 6900), sodomy (§ 7038-1).

120. GIAUQUE, *supra* note 117, § 7436-10 at 1815. "[A]fter the expiration of the term for which he was so sentenced, he may, in the discretion of the board of managers, be allowed to go upon parole outside of the buildings and enclosures." *Id.*

121. 95 LAWS OF OHIO 410 (1902). A search for the reason behind the repeal of Ohio's first habitual offender statute was unsuccessful. There is a lack of state legislative history, especially when trying to research statutes repealed over 90 years ago.

In *Blackburn v. State*, the Ohio State Supreme Court first ruled on the constitutionality of the state's first habitual offender statute, the legislative intent behind the statute, and what must be contained in an indictment.¹²² Another notable case regarding Ohio's first habitual offender statute was *In re Kline*, in which the court refused to free a man imprisoned under the statute after the legislature repealed the statute.¹²³

In 1929 Ohio's governor approved a second habitual offender statute.¹²⁴ The act's purpose was "to provide punishment for habitual felons."¹²⁵ The statute had two distinct subsections. Section 13744-1 concerned the offender who had been twice previously convicted of certain enumerated felonies.¹²⁶

122. *Blackburn v. State*, 36 N.E. 18, 20-21 (Ohio 1893). A jury convicted Blackburn of burglary and larceny. *Id.* That conviction, along with prior felony convictions, caused Blackburn to be sentenced as an habitual criminal, under Revised Statutes of Ohio §7436-10. *Id.* Blackburn appealed to the Ohio Supreme Court averring that the habitual criminal statute was unconstitutional and that the statute was poorly written and did not reflect legislative intent. *Id.* at 20. The court reasoned that the legislature did not intend the statute to be a new crime, the legislature sought to enhance prison terms for habitual offenders. *Id.* This is evinced in the fact that the legislature made the statute a supplement to the "act relating to the imprisonment of convicts," as opposed to the acts regarding crime and punishment. *Id.* The court refused to strike the law down as a violation of the *ex post facto* clause of the U.S. Constitution. *Id.* at 21. "The additional penalty was not imposed for the first offense, nor for the second one, but because, having been convicted of their commission, he became one of a class of dangerous criminals, against whom more rigorous measures should be invoked." *Id.* The court also delineated the requirements for the indictment in habitual offender cases. *Id.* "[T]he indictment under this statute should set forth the two prior convictions, and the sentence and commitment of the prisoner to some penal institution on account thereof." *Id.* The court reasoned that an indictment containing this information was enough "to apprise him of the evidence to be adduced to establish their existence, and to enable him to defend against them." *Id.*

123. *In re Kline*, 70 N.E. 511, 512 (1904). In 1889, the court of common pleas of Montgomery County found the defendant guilty of larceny and burglary and adjudged him an habitual criminal. *Id.* The defendant received a life sentence under Ohio's habitual criminal statute. *Id.* Three years later the Ohio legislature repealed the habitual criminal act "(95 Ohio Laws, p. 410)." *Id.* The defendant insisted that because the statute had been repealed, he should no longer be jailed for life. *Id.* The Ohio supreme court held that the defendant's sentence should not be vacated. *Id.* The court reasoned that the "Legislature cannot intervene and vacate the judgement of the courts, either directly or indirectly, by repeal of a statute under which the judgement was rendered, because that would be an exercise of judicial, not legislative, power." *Id.* The court also reasoned that it was not within their power to interfere. *Id.* "If the courts could resume jurisdiction, and interfere with the execution of sentence, after regular procedure, judgement, and commitment under sentence, there could be no final judgement, and no end to legal controversy." *Id.*

124. 113 LAWS OF OHIO 40 (1929).

125. *Id.*

126. 10 OH. GEN. CODE ANN. § 13744-1 (Anderson 1938).

A person convicted in this state of arson, burning property to defraud insurer, robbery, pocket-picking, burglary, burglary of an inhabited dwelling, murder of the second degree, voluntary manslaughter, assault to kill, rob, or rape, cutting, stabbing, or

This section of the statute provided for minimum mandatory jail time equal to the "maximum statutory penalty for such offense."¹²⁷ The second subsection specified a life sentence for any person who had been three times previously convicted of the felonies listed.¹²⁸ The statute was silent on the aspect of parole.¹²⁹

A defendant unsuccessfully challenged the second habitual offender statute on the basis that it violated the double jeopardy clause of the constitution.¹³⁰ The Ohio Supreme Court declared the statute to be constitutional,

shooting to kill, or wound, forcible rape or rape of a child under twelve years of age, incest, forgery, grand larceny, stealing motor vehicle, receiving stolen goods of the value of more than \$35.00, perjury, kidnapping or child stealing, who shall have been previously two times convicted of any hereinbefore specified felonies separately prosecuted and tried therefor, either in this state or elsewhere, shall be adjudged an habitual criminal and shall be sentenced by the court to a term of imprisonment equal to the *maximum statutory penalty for such offense*; provided that any such convictions which result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purpose of this section as one conviction. (emphasis added)

Id.

127. *Id.*

128. 10 OH. GEN. CODE ANN. § 13744-2 (Anderson 1938).

A person convicted in this state of any of the offenses in . . . [Ohio Gen. Code §13744-1], who shall have been previously convicted three times of any of the said offenses, separately prosecuted and tried therefor either in this state or elsewhere, shall be adjudged an habitual criminal, and shall be sentenced to imprisonment *for the term of his or her natural life*; provided that any of such convictions which result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purposes of this section as one conviction.

Id. (emphasis added).

129. *Id.*

130. *State v. Mahoney*, 17 N.E.2d 277, 279 (Ohio Ct. App. 1936). The defendant was serving a sentence in the Ohio penitentiary for grand larceny, the court having imposed the sentence on January 30, 1936. *Id.* at 277. The defendant had been previously been found guilty of burglary, larceny and grand larceny. *Id.* While in prison on the 1936 grand larceny charge, the defendant was indicted under Ohio's habitual criminal statute (Ohio Gen. Code §§ 13744-1 and -3). *Id.* At a bench trial, the judge found the defendant guilty of being an habitual offender and sentenced the defendant to serve at least seven years (the statutory maximum for grand larceny). *Id.* The defendant alleged that Ohio's habitual criminal statute has placed the defendant "twice in jeopardy for the same crime." *Id.* "[T]he re-sentencing of the defendant in the original case, which was a third offense and which had theretofore been determined and while the defendant was still serving time under this last sentence, was double jeopardy." *Id.* The statute had a provision which allowed a prisoner to be resented. *Id.* The statute allowed the prosecuting attorney to indict a prisoner as an habitual offender "at any time either before or after sentence." *Id.* The court relied heavily on a New York case with a similar fact pattern, *People v. Gowasky*. *Id.* The court noted that there was no "dissent", the decision was made by a "strong court", and "the decision is in accord with the trend of authority." *Id.*

We find nothing unconstitutional in these amendments of 1926. Similar provisions, as

not cruel and unusual punishment, and an unequal application of the law.¹³¹ In *Sims v. Alvis*, the Ohio Supreme Court held that convictions committed before the habitual criminal statute became law could still be used against a defendant.¹³² While the state supreme court upheld the law, a federal district court refused to allow juvenile convictions to be used to enhance punishment.¹³³

has been stated, have existed for a long time in other jurisdictions, and the courts have uniformly held them to be legal. Our own decisions have strongly intimated, if not directly stated, that the matter was subject to legislative control.

People v. Gowasky, 155 N.E. 737, 741 (N.Y. 1927). See also *Maloney v. Maxwell*, 186 N.E.2d 728, 729 (Ohio 1962) ("It is now a well established principle that habitual criminal acts are valid and do not conflict with the constitutional provisions relating to . . . double jeopardy."). See *supra* notes 70-78, for a discussion of United States Supreme Court decisions regarding the constitutionality of habitual offender statutes.

131. *State ex. rel. Drexel v. Alvis*, 91 N.E.2d 22, 23 (Ohio 1950). "Drexel, was found guilty of burglary and was sentenced to the Ohio penitentiary for a term of from one to fifteen years." *Id.* He was later indicted under Ohio's habitual criminal act, Ohio Gen. Code §13744-1. *Id.* A jury found Drexel guilty of being an habitual and sentenced him to the maximum of fifteen years imprisonment. *Id.* Drexel avers "that his conviction under the habitual criminal act, . . . is a double conviction for a single act and therefore constitutes double jeopardy, and that the act . . . , provides for cruel and unusual punishment." *Id.* The Ohio Supreme Court simply stated that "[t]he Habitual Criminal Act is constitutional" in holding that the does not constitute either cruel and unusual punishment or an "unequal application of the law." *Id.* The court relied in part on *Blackburn v. State* (see *supra* note 100) in holding that the statute is constitutional. *Id.* at 246.

132. *Sims v. Alvis*, 98 N.E.2d 76 (Ohio Ct. App. 1950). Sims was found guilty of grand larceny by the court of common pleas for Franklin County. *Id.* at 77. He was sentenced to life imprisonment under Ohio's habitual criminal statute (Ohio Gen. Code §13744-1). *Id.* "The record discloses further that one of the offenses committed by the petitioner . . . was committed in 1927, which was prior to the enactment of the Habitual Criminal Act." *Id.* Sims brought an action alleging the habitual offender statute was unconstitutional because it operates retroactively, by placing him in jeopardy for a crime committed before the legislature passed the statute. *Id.* The court reasoned that the law gave notice to people with prior criminal records that those records would be used against the people if the courts found them guilty of another felony. *Id.*

A law cannot properly be considered retroactive when it apprises one who has established by previous unlawful acts a criminal character that if he perpetrates further crimes the penalty denounced by the law will be heavier than upon one less hardened in crime. In such case the party is informed, before he commits the subsequent offense, of the full measure of the liability he will incur by its perpetration, and therefore does not fall within the class that is entitled to the protection afforded by the constitutional guaranty against the enactment of ex post facto or retroactive laws, for the object sought by those guaranties, in respect to this kind of legislation, is that no transgressor of a penal statute shall be subjected by subsequent legislation to any penalty, liability, or consequence that was not attached to the transgression when it occurred.

Id.

133. *Workman v. Cardwell*, 338 F. Supp 893, 898 (N.D. Ohio 1972), *aff'd in part, vacated in part on other grounds*, 471 F.2d 909 (6th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973). The court cited the Ohio Revised Code §2151.358 in holding that juvenile convictions cannot be used to "enhance punishment". *Id.* Section 2151.358 reads in relevant part: "The disposition

The change in the second habitual offender statute evidences that Ohio had become lenient on the habitual criminal.¹³⁴ The second habitual offender statute mandated life imprisonment only after three previous convictions, whereas the first habitual offender statute authorized a life sentence after only two convictions.¹³⁵

The second statute was in effect until 1974, when the legislature repealed the statute as a part of the complete overhaul of the Ohio Revised Code.¹³⁶ The move to a more flexible approach was supported by the judiciary, but not the citizens of Ohio.¹³⁷ Violent crime is as great a problem now as it was when the legislature repealed the statute in 1974.¹³⁸ However, presently the Ohio State Legislature is willing to move away from indeterminate sentencing by proposing what is potentially Ohio's third habitual offender statute.¹³⁹ Now that Ohio appears to be on the brink of passing a third habitual offender statute it must be determined whether the law will pass Eighth Amendment scrutiny.

Ohio's Proposed Habitual Offender Statute

Many Ohioans believe that crime is the toughest challenge confronting the state.¹⁴⁰ Recidivism rates have been estimated to be 60-70% nationally,

of a child under the judgement rendered or any evidence given in the [juvenile] court shall not be admissible as evidence against the child in any other case or proceeding in any other court" *Id.*

134. Compare GIAUQUE, *supra* note 117, § 7436-10 at 1815 (which imposed a life sentence on a person convicted of any felony, after two previous felony convictions) with 10 OH. GEN. CODE ANN. §§ 13744-1 & -2 (Anderson 1938) (which contained a short list of felonies which, if committed subsequent to two felony convictions, would allow the prosecutor to seek an indictment under the habitual criminal statute).

135. *Id.*

136. See '3-Strikes' Crime Proposals Just New Twist on Old Idea, COLUMBUS DISPATCH, Jan. 30, 1994, at 6B. A chief sponsor of the overhaul suggested the best sentencing approach is the flexible approach. *Id.* The flexible approach allows the judge to take into account the crime and the criminal and does not take away the judge's discretion. *Id.*

137. See Ludlow, *infra* note 140, at 1A.

138. Carolyn Skorneck, *Violent Crime Up in '92, FBI Says Aggravated Assaults, Rapes, Push Up the Number of Violent Offenses*, AKRON BEACON J., Oct. 3, 1993, at A10. "Violent crimes reported to police edged up last year because of increases in aggravated assaults and rapes" *Id.* "[T]he amount of violent crime and other grave offenses nationwide remains intolerable," FBI Director Louis J. Freeh said" *Id.* Youthful perpetrators are committing violent crimes earlier in their criminal careers, as opposed to starting off their careers "with minor property crimes." *Id.* "[W]e're seeing them become more violent very, very, quickly." *Id.*

139. See Suddes, *supra* note 11, at 1A.

140. Randy Ludlow, *Crime Our Top Worry 27 Percent of Ohioans Call it No. 1 Problem*, CINCINNATI POST, Mar. 21, 1994, at 1A. In a University of Cincinnati poll taken in October of 1993, 27 percent of Ohioans cited crime as the number one problem facing the state. *Id.*

and there is no reason to expect that Ohio's rates are lower.¹⁴¹ While President Clinton has called on Congress to pass a "Three Strikes and You're Out"¹⁴² law, the Ohio House of Representatives approved a similar piece of legislation.¹⁴³

On February 15, 1994, the Ohio House of Representatives passed House Bill No. 161.¹⁴⁴ Among other things, the bill would enact §2941.145 of the Ohio Revised Code, which would become Ohio's third habitual offender statute passed in the last 110 years.¹⁴⁵ Under the proposed language of §2941.145 those found guilty of their third felony offense would be sentenced to life imprisonment without the possibility of parole.¹⁴⁶ The list of enumerated

In the poll, crime surpassed the economy as the main worry of Ohioans. *Id.* The economy had been the main concern of Ohioans for the previous three years. *Id.* Eighty-six percent of the people polled believe crime is more pervasive than ever. *Id.* Fifty-four percent of those polled believe that crime has increased in their communities. *Id.* However, the crime rate in the U.S. and in large cities has actually dropped. *Id.*

141. Claiborne Pell, *Should Inmates Get Student Aid? Yes: Pell Grants Dramatically Reduce Recidivism*, USA Today, Mar. 17, 1994, at 13A. A 1989 study of recidivism rates of prisoners released in 1983 found that 62.5% of those released were rearrested within three years of release. Allen J. Beck, Bureau of Justice Statistics, Special Report: Recidivism of Prisoners Released in 1983, 2 (1989). The study investigated recidivism rates among 108,580 prisoners released from 11 state prison, including Ohio. *Id.* at 1. The 108,580 prisoners released by the 11 states accounted for over 57% of the prisoners released nationally that year. *Id.* The study found that the more times a prisoner had been arrested previously the more likely it was the person would be rearrested. *Id.* at 7. The recidivism rate for those with one prior arrest was approximately 40% while the rate for those arrested 11 or more times previously had a recidivism rate of nearly 80%. *Id.*

142. See Ludlow, *supra* note 140, at 1A. "Three strikes and your out" is the name given to legislation that mandates life imprisonment for three-time violent felony offenders. *Id.*

143. Randy Ludlow, *3 Strikes and Out Crime Bill Passes Ohio House*, CINCINNATI POST, Feb. 16, 1994, at 5A. The Ohio House passed the "Three Strikes and You're Out" measure 95-3. *Id.* The measure would cause mandatory life sentences to be imposed on criminals who are convicted of their third felony. *Id.* The bill is currently in the Senate Judiciary Committee as of the writing of this Comment. John Chalfant, *Senate is in Crime Time Hearing Set on 3 Strikes*, PLAIN DEALER (Cleveland), Feb. 22, 1994, at 5B. "I don't see any deadlines, and I certainly don't see a deadline of November 1994 . . .," said Ohio State Senator Barry J. Levey, chairman of the Senate Judiciary Committee. *Id.*

144. AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993). The Bill passed the Ohio House on February 15, 1994. *Id.*

145. James Bradshaw, *3 Strikes Plan Full of Pitfalls, Moyer Warns*, COLUMBUS DISPATCH, Feb. 17, 1994, at 1C. "In 1884 we had a 'three-strikes-and-you're-out' law, and in 1927 a 'four-strikes-and-you're-out' one." *Id.*

146. AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993). The language of the proposed habitual offender statute is as follows:

§ 2941.145 (A) Imposition of a term of imprisonment for life without the possibility of parole pursuant to division (D)(1) of section 2929.11 (Ohio's Penalties for felony statute) of the revised code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender twice previously has

felonies included in the proposed legislation is: aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, felonious sexual penetration, aggravated arson, aggravated robbery, robbery, aggravated burglary, burglary, child stealing¹⁴⁷ and involuntary manslaughter.¹⁴⁸ The enumerated felonies are either felonies of the first or second degree.¹⁴⁹

The proposed statute has other properties, besides the list of felonies. The proposed statute dictates the form of the indictment.¹⁵⁰ Subsection (D) of the proposed statute confers upon the defendant, in a case tried by jury, the right to have the trial judge determine whether the defendant has the requisite criminal background to warrant inclusion under the habitual offender statute.¹⁵¹

Ohio's proposed habitual criminal statute appears to be a combination of both Ohio's previous habitual offender statutes.¹⁵² The habitual criminal

been convicted of or pleaded guilty to any two of the following violations:

(1) a violation of 2903.01 [aggravated murder], 2903.02 [murder], 2903.03 [voluntary manslaughter], 2903.11 [felonious assault], 2905.01 [kidnapping], 2907.02 [rape], 2907.12 [felonious sexual penetration], 2909.02 [aggravated arson], 2911.01 [aggravated robbery], 2911.02 [robbery], 2911.11 [aggravated burglary], or 2911.12 [burglary] of the Revised Code;

(2) a violation of section 2903.04 [involuntary manslaughter] or 2905.04 [child stealing] of the Revised Code that is an aggravated felony of the first degree;

(3) complicity in the commission of a violation specified in division (A)(1) or (2) of this section if the attempt is an aggravated felony of the first or second degree;

(4) a violation of any existing or former law of this state, any other state, or the United States that is or was substantially equivalent to any violation set forth in division (A)(1), (2), or (3) of this section.

Id.

147. *Id.* Child stealing must be an aggravated felony of the first degree to fall within Ohio's proposed habitual criminal statute. *Id.* To be an aggravated felony of the first degree child stealing must be done by a non-parent or stepparent and harm must be done to the child. OHIO REV. CODE ANN. § 2905.04(C)(2) (Anderson 1993).

148. *Id.* Involuntary manslaughter must be an aggravated felony of the first degree to fall within Ohio's proposed habitual criminal statute. *Id.* Involuntary manslaughter is an aggravated felony of the first degree if it occurs while the defendant was committing or attempting to commit a felony. OHIO REV. CODE ANN. § 2903.04(C) (Anderson 1993).

149. *Id.*

150. *Id.* "[T]he Revised Code is precluded unless the indictment, count in the indictment, or information charging the offense specifies that the offender twice previously has been convicted of or pleaded guilty to any two of the following violations:" *Id.*

151. *Id.*

152. Compare AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993), *supra* note 146 with Revised Statutes of Ohio § 7436-10 (1896)*supra* note 117 and 10 OH.

statute of 1885 imposed a life sentence upon a felon who had been twice previously convicted, as does the proposed statute.¹⁵³ Like the habitual criminal statute of 1929, the proposed statute would only affect those who had committed one of a number of enumerated felonies.¹⁵⁴ The proposed statute does not allow for parole and neither did the statute of 1929.¹⁵⁵ The habitual offender statute of 1885 allowed for parole.¹⁵⁶

The possible effect of Ohio's habitual criminal statute can be determined by looking at the effect habitual criminal statutes have had in other states. The proposed Ohio statute can be compared to a narrow habitual offender statute (Illinois Statute chapter 720 paragraph 5/33B-1)¹⁵⁷ and a broad statute (Alabama Code § 13A-5-9).¹⁵⁸

Illinois is a state that is much the same as Ohio.¹⁵⁹ Illinois has had a habitual criminal statute for approximately 15 years.¹⁶⁰ The Illinois statute is

GEN. CODE ANN. § 13744-1 & -2 (Anderson 1938) *supra* notes 126 & 128. *See also infra* notes 153-56.

153. *Compare* AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) (imposes a life sentence on a person with two previous felony convictions, who is convicted of a subsequent felony) *with* GIAUQUE, *supra* note 117, § 7436-10 at 1815 (imposes a life sentence on a person with two previous felony convictions, who is convicted of a subsequent felony).

154. *Compare* AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) (aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, felonious sexual penetration, aggravated arson, aggravated robbery, robbery, aggravated burglary, burglary, child stealing, and involuntary manslaughter are the felonies enumerated by the statute) *with* 10 OH. GEN. CODE ANN. § 13744-1 (Anderson 1938) (arson, burning property to defraud insurer, robbery, pocket-picking, burglary, burglary of an inhabited dwelling, murder of the second degree, voluntary manslaughter, assault to kill, rob, or rape, cutting, stabbing, or shooting to kill, or wound, forcible rape or rape of a child under twelve years of age, incest, forgery, grand larceny, stealing motor vehicle, receiving stolen goods of the value of more than \$35.00, perjury, kidnapping and child stealing were the felonies enumerated by the statute).

155. *Compare* AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) (calls for "[i]mposition of a life term without the possibility of parole . . .") *with* 10 OH. GEN. CODE ANN. § 13744-1 (Anderson 1938) (the offender "shall be sentenced to imprisonment for the term of his or her natural life").

156. *See* GIAUQUE, *supra* note 117, at 1815-16. Section 7436-10 of the Revised Statutes of Ohio read as follows: "[the offender] may, in the discretion of the board of managers, be allowed to go upon parole outside the buildings and enclosures." *Id.* at 1816.

157. *See infra* note 160 for text of statute.

158. *See infra* note 164 for text of statute.

159. THE WORLD ALMANAC AND BOOK OF FACTS 626 & 627 (1990). Illinois ranks sixth in population and Ohio ranks seventh. *Id.* Over 83% of Illinois' population lives in urban areas, while slightly over 73% of Ohio's population lives in urban areas. *Id.*

160. ILL. REV. STAT. ch. 720 para. 5/33B-1 (1993). The Illinois habitual criminal statute reads in part as follows:

§ 33B-1. (a) Every person who has been twice convicted in any state or federal court

much like Ohio's proposed statute.¹⁶¹ Both dictate that a person twice convicted, of any one of a list of enumerated felonies, will be sentenced to life imprisonment upon a third conviction of one of those felonies.¹⁶² Of the nearly 35,000 people behind bars in Illinois, there are only 92 convicts serving mandatory life imprisonment, as a result of the habitual offender statute.¹⁶³

Alabama is another state which has adopted a habitual offender statute.¹⁶⁴ The cost of the Alabama statute on the state's prison has been studied.¹⁶⁵ Comparing Ohio's proposed statute and the statute that exists in

of an offense that contains the same elements as an offense now classified as in Illinois as a Class X felony, criminal sexual assault or first degree murder, and is thereafter convicted of a Class X felony, criminal sexual assault or first degree murder, committed after the two prior convictions, shall be adjudged an habitual criminal

(e) Except when the death penalty is imposed, anyone adjudged an habitual criminal shall be sentenced to life imprisonment.

Id. There are currently 23 crimes considered Class X felonies in the state of Illinois, including, organization of an aggravated vehicle theft conspiracy, solicitation of murder, solicitation of murder for hire, attempted murder, drug induced homicide, aggravated kidnapping, indecent solicitation of an adult, exploitation of a child, heinous battery, aggravated battery with a firearm, aggravated battery of a child or institutionalized mentally retarded person, home invasion, criminal sexual assault, aggravated criminal sexual assault, ritualized abuse of a child, armed robbery, aggravated vehicular hijacking, aggravated arson, aggravated discharge of a firearm, treason, and bringing contraband into or possessing contraband in a penal institution. ILL. REV. STAT. ch. 625 para. 5/4-103.3, ch. 720 para. 5/8-1.1, 5/8-1.2, 5/8-4, 5/9-3.3, 5/10-2, 5/11-19.2, 5/12-4.1, 5/12-4.2, 5/12-4.3, 5/12-11, 5/12-13, 5/12-14, 5/12-33, 5/18-2, 5/20-1.1, 5/24-1.2, 5/30-1, 5/31A-1.1, 5/31A-1.2, 5/11-6.5, & 5/18-4 (Smith-Hurd 1993 & Supp. 1994).

161. Compare AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) *supra* note 146 with Ill. Rev. Stat. ch. 720 para. 5/33B-1 (1993) *supra* note 160.

162. Compare AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) *supra* note 146 with Ill. REV. STAT. ch. 720 para. 5/33B-1 (1993) *supra* note 160.

163. See Berkman, *supra* note 68. "But of nearly 25,000 new convicts, only 92 are three-time, Class X mandatory lifers." *Id.*

164. ALA. CODE § 13A-5-9. The statute mandates a life sentence without the possibility of parole. *Id.*

(c) In all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony, he must be punished as follows:

(3) On conviction of a Class A felony, he must be punished by imprisonment for life without parole.

Id. According to the current Alabama code there are currently 12 felonies which can be considered Class A felonies: solicitation for murder, attempted murder, conspiracy to commit murder, murder, kidnapping in the first degree, rape in the first degree, sodomy in the first degree, sexual torture, burglary in the first degree, arson, robbery in the first degree, and treason. ALA. CODE §§ 13A-4-1, -4-2, -4-3, -6-2, -6-43, -6-61, -6-63, -6-65.1, -7-5, -7-41, -8-41, & -11-2.

165. See Siegler & Culliver, *supra* note 44, at 57.

Alabama may provide a benchmark for the effect of Ohio's proposed statute on prison cost. The Alabama statute differs from the proposed Ohio statute in that three prior convictions are required in Alabama, while only two would be necessary in Ohio before a life sentence without possibility of parole could be imposed.¹⁶⁶ Alabama's habitual felony offender statute is tougher than Ohio's.¹⁶⁷ In Alabama, the three previous convictions can be for *any* felony conviction,¹⁶⁸ while in Ohio the two previous felony convictions are only applicable if they are on the list of 14 specified by the statute.¹⁶⁹

Alabama's habitual offender statute caused the "life without possibility of parole" population to increase by an average of 277 persons per year.¹⁷⁰ The number of people incarcerated as a result of Alabama's habitual criminal statute should be greater than the number of persons jailed under Ohio's habitual criminal statute,¹⁷¹ because of the way in which the statutes define an habitual criminal.¹⁷²

From the preceding discussion, it is clear that the larger the list of felonies specified by the habitual criminal statute, the more likely it is that a criminal will be sentenced under it. Ohio's proposed habitual offender statute contains a finite list of offenses for which an offender can be convicted and

166. Compare AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) (which imposes a life sentence on a felon convicted of aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, felonious sexual penetration, aggravated arson, aggravated robbery, robbery, aggravated burglary, burglary, child stealing, or involuntary manslaughter, if that felon has two previous felony convictions for any of the enumerated offenses) with ALA. CODE § 13A-5-9 (The statute mandates a life sentence without the possibility of parole "[i]n all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony . . .").

167. Compare AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) *supra* note 146 with ALA. CODE § 13A-5-9 *supra* note 164.

168. See ALA. CODE § 13A-5-9 *supra* note 164.

169. See AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) *supra* note 146.

170. See Siegler & Culliver, *supra* note 44, at 61. The study showed a mean annual increase in "life without possibility of parole" (LWOP) inmates each year between the years of 1981 and 1986. *Id.* In the same six year period, the actual number of inmates incarcerated as a result of the habitual offender statute was 1882. *Id.* In comparison the number of LWOP inmates jailed for reasons other than the habitual offender statute grew annual by only 61 persons per year. *Id.* The study showed that to properly house the prison population, which results from the habitual criminal statute, the Alabama Department of Corrections would have to build and maintain over 4000 new beds. *Id.*

171. Compare AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) *supra* note 146 with ALA. CODE § 13A-5-9 *supra* note 164.

172. Compare AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) *supra* note 146 with ALA. CODE § 13A-5-9 *supra* note 164. See also *supra* notes 164-71 and accompanying text.

sentenced to life without parole.¹⁷³ Unlike the Alabama statute in which a defendant need only be convicted of an enumerated offense once, the Ohio statute requires the defendant to be convicted of a specified offense three times.¹⁷⁴

Ohio's proposed statute is more like the Illinois habitual criminal statute and because of the similarity between the two, it is likely that a limited number of felons would be jailed under Ohio's habitual offender statute.¹⁷⁵

Will Ohio's Proposed Statute Be Disproportionate?

The only challenge to a habitual offender statute that the Supreme Court has upheld was a proportionality challenge.¹⁷⁶ Therefore Ohio's proposed law must pass this test. Disproportionality is a concept which has its origins in English constitutional law.¹⁷⁷ In the United States, proportionality is rooted in the Eighth Amendment which prohibits sentences which are not proportionate to the crime.¹⁷⁸ The Supreme Court has held that "states have a valid interest in deterring and segregating habitual criminals",¹⁷⁹ but those interests

173. See AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) *supra* note 146.

174. Compare AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) (which imposes a life sentence on a felon convicted of aggravated murder, murder, voluntary manslaughter, felonious assault, kidnapping, rape, felonious sexual penetration, aggravated arson, aggravated robbery, robbery, aggravated burglary, burglary, child stealing, or involuntary manslaughter, if that felon has two previous felony convictions for any of the enumerated offenses) with ALA. CODE § 13A-5-9 (The statute mandates a life sentence without the possibility of parole "[i]n all cases when it is shown that a criminal defendant has been previously convicted of any three felonies and after such convictions has committed another felony . . .").

175. Compare AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993) (which contains a list of enumerated felonies which are included under the proposed habitual criminal statute) with ILL. REV. STAT. ch. 720 para. 5/33B-1 (1993) (which contains a finite list of crimes included in the habitual criminal statute).

176. See *supra* notes 98-110 and accompanying text.

177. *Rummel v. Estelle*, 445 U.S. 263, 288-89 (1980) (Powell, J., dissenting). Powell cited the Magna Carta of 1215 as authority for the proposition that "[a] free man shall not be [fined] for a trivial offence, except in accordance with the degree of the offence." *Id.* at 288-89. Powell said that "[t]he scope of the Cruel and Unusual Punishments Clause extends not only to barbarous methods of punishment, but also to punishments that are grossly disproportionate." *Id.* at 288. "The inquiry focuses on whether a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice." *Id.*

178. See Bayley, *supra* note 16, at 524. "[T]he prohibitions of [the Eighth A]mendment include (1) barbaric methods of punishment and (2) punishments that are exceedingly disproportionate to the crimes committed." *Id.*

179. *Parke v. Raley*, 113 S.Ct. 517, 522 (1992).

do not extend to disproportionate sentences.¹⁸⁰ However, "the proportionality concept is not static, but is a 'progressive' [concept] one which 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society . . .'"¹⁸¹

The Supreme Court in *Solem v. Helm*,¹⁸² outlined "objective factors" that courts must look at when determining whether a sentence is disproportionate.¹⁸³

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.¹⁸⁴

The Court, in *Solem*, also proffered a standard for judicial review of sentences.¹⁸⁵ The Court said that, in reviewing sentences, deference should be given to both the sentencing court and the legislature.¹⁸⁶

180. *Solem v. Helm*, 463 U.S. 277 (1983). In *Solem* South Dakota invoked its recidivist statute on Helms and sentenced him to life imprisonment for writing a "no account" check. *Id.* The court held "that a criminal sentence must be proportionate to the crime for which the defendant has been convicted," and overturned the sentence. *Id.* at 290.

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of the Magna Carta were devoted to the rule that [fines] may not be excessive. And the principle was repeated and extended in the First Statute of Westminster. These were not hollow guarantees, for royal courts relied on them to invalidate disproportionate punishments.

Id. at 284-85 (footnotes omitted). "Although the precise scope of [the Eighth Amendment's Excessive Bail Clause] is uncertain, it at least incorporated 'the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.'" *Id.* at 285.

181. *Hart v. Cooner*, 483 F.2d 136, 140 (4th Cir. 1973) (footnotes omitted), *cert. denied*, 415 U.S. 938 (1974). The Fourth Circuit quoted from the Supreme Court's decision in *Trop v. Dulles*, 356 U.S. 86, 101 (1958). "[T]he words of the [Eighth] Amendment are not precise, and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101 (footnotes omitted).

182. 463 U.S. 277 (1983).

183. *Id.* at 290-92.

184. *Id.* at 292. With regard to gravity and harshness the Court reasoned that courts should look to the "nature" and the "pettiness" of the crime. *Id.* at 291. In clarifying the second factor, the Court concluded that "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue is excessive." *Id.* To properly apply the third factor a court must look to other jurisdictions as the Court did in *Enmund*. *Id.* at 292. In that case, the Court looked which jurisdictions would permit capital punishment, in similar cases, and determined that few if any would invoke the death penalty. *Id.* Therefore, in that case the death penalty was disproportionate. *Id.*

185. *Id.* at 290 n. 16.

186. *Id.*

As previously stated in this comment, the ruling in *Solem* has been questioned by the Supreme Court.¹⁸⁷ Only once has the Ohio Supreme Court cited *Solem*, and that was in the dissent in *State v. McDonald*.¹⁸⁸ The Ohio courts have continued to use the factors outlined by the Supreme Court in *Solem* when the Ohio courts look at the disproportionality of a sentence.¹⁸⁹

Based on the Court's reasoning in *Solem*, courts now have objective factors to use in deciding whether or not a sentence is disproportionate.¹⁹⁰ When those factors are applied to a hypothetical defendant under Ohio's proposed statute, the statute passes the proportionality test with ease.

Absent specific authority, it is not the role of an appellate court to substitute its judgement for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

Id.

187. See *supra* notes 106-07 and accompanying text.

188. 509 N.E.2d 57, 64 (Ohio 1987) (Brown, J., dissenting). Justice Brown dissented in a case where the issue before the court was the constitutionality of an Ohio criminal tools statute. *Id.* at 58. Justice Brown chose to look at statute with regard to the sentence and he looked to *Solem* for guidance. *Id.* at 62. The majority did not view the case as an Eighth Amendment question, in fact they never mentioned disproportionality or *Solem*. *Id.* at 58-60.

189. *State v. Frambach*, 612 N.E.2d 424, 428-29 (Ohio Ct. App. 1992). In a case before the Ohio Court of Appeals, two defendants raised the issue of proportionality. *Id.* at 428.

This decision [*Solem*] has recently come under attack. In *Harmelin v. Michigan*, the court was confronted with the question of whether a state could constitutionally punish possession of six hundred seventy-two grams of cocaine with a mandatory term of life in prison without possibility of parole. In affirming the sentence, two justices argued for overruling *Solem*

Three other justices concurred in judgement on the grounds that the harsh sentence was not unwarranted in light of the gravity of the offense.

Since not enough votes were mustered to overturn *Solem*, we are still bound by that decision.

Id. See also *City of Cleveland v. Greene*, No. 57637, 1990 WL 156084, at *3-4 (Ohio Ct. App., Oct. 18, 1990) ("this court must consider objective factors including the gravity of the offense and the harshness of the penalty."); *State v. Douglas*, 586 N.E.2d 1096, 1099 (Ohio Ct. App. 1989) (the court used the *Solem* factors to determine "that the registration requirement of R.C. 2950.02, . . . [does not violate] the cruel and unusual punishment provisions of the [constitution]"); *State v. Hutchinson*, No. 50530, 50560, 1986 WL 6965, at *7-8 (Ohio Ct. App., June 19, 1986) (the issue before the court was the constitutionality of maximum consecutive sentences).

190. See Bayley, *supra* note 16, at 529. "[W]ith Helm's analytical framework intact, a review of sentences for proportionality supposedly will guarantee a criminal defendant constitutional protection against cruel and unusual punishment." *Id.*

Applying the Factors in Solem to a Hypothetical Defendant Under Ohio's Proposed Statute

James Dean Carroway (the hypothetical defendant) has two previous convictions. In 1973 at the age of 18 he was convicted of burglary when the police caught him stealing a tool box full of tools from a neighbor's garage.¹⁹¹ In 1985 a court found him guilty of child stealing. After a difficult divorce and child custody battle, he abducted a child from the playground, in a fit of rage, thinking it was his own child. Police caught him just as he realized his mistake.¹⁹² In 1995 just after Ohio's habitual criminal statute became effective, a friend of Mr. Carroway paid him to burn down the friend's house so that the friend could collect an insurance settlement.¹⁹³

Mr. Carroway's prior convictions and his recent arrest for aggravated arson enables the prosecutor can sentence Carroway under Ohio's recently passed habitual criminal statute.¹⁹⁴ Carroway has been twice previously convicted of the specified crimes and is on trial for the commission of another specified crime.¹⁹⁵

Assuming a court found Carroway guilty and sentenced him to life imprisonment without parole and assuming Carroway appealed the sentence, an appellate court would review the sentence and apply the *Solem* factors.¹⁹⁶ The appellate court would first look at "the gravity of the offense and the harsh-

191. For his actions Carroway would be guilty of burglary under § 2911.12 of the Ohio Revised Code. The statute reads in part that "(A) No person, by force, stealth, or deception, shall do any of the following: (1) Trespass in an occupied structure or in a separately secured or separately occupied portion thereof, with the purpose to commit therein any theft offense or any felony." OHIO REV. CODE ANN. § 2911.12 (Anderson 1993).

192. The court found Carroway guilty of child stealing under Ohio Revised Code § 2905.04. Child stealing is an aggravated felony of the second degree "[i]f the offender is not the natural or adoptive parent, or a stepparent of the minor." OHIO REV. CODE ANN. § 2905.04(C)(2) (Anderson 1993).

193. A court could find Mr. Carroway guilty of aggravated arson under the Ohio Revised Code § 2909.02. Carroway violated the statute because he "by means of fire or explosion, . . . knowingly: . . . [c]reate[d], through the offer or acceptance of an agreement for hire or other consideration, a substantial risk of serious physical harm . . . to an occupied structure." OHIO REV. CODE ANN. § 2909.02(A)(3) (Anderson 1993).

194. AM. SUB. H. B. NO. 161, 120th General Assembly, Regular Session (1993). The proposed statute would sentence anybody convicted of a felony, who had been twice previously convicted of "violent" felonies, to life imprisonment without the possibility of parole. *Id.* Burglary, child stealing, and aggravated arson are all on the list of offenses included in the proposed statute. *Id.*

195. *Id.*

196. See *State v. Frambach*, 612 N.E.2d 424, 428 (Ohio Ct. App. 1992). In a case before the Ohio Court of Appeals, two defendants raised the issue of proportionality. *Id.* The court reasoned that it was "bound by [the *Solem*] decision." *Id.* at 429.

ness of the penalty.”¹⁹⁷ When analyzing a case using this factor, courts have generally looked “to the seriousness of the offense, including the moral gravity of the crime.”¹⁹⁸ All of the crimes enumerated in Ohio’s proposed statute are considered crimes of violence, except one, child stealing.¹⁹⁹ All of Carroway’s crimes either put people in jeopardy or were an intrusion, and as such constitute crimes of violence.²⁰⁰

The “gravity” of Carroway’s arson offense is serious, when analyzed within the framework set forth in *United States v. Sarbello*.²⁰¹ Carroway put others at risk when he tried to profit from his crime.²⁰² He placed the lives of firemen and others in danger.²⁰³ “Only in the rare case will the felonies supporting a life sentence be so lacking in inherent gravity”²⁰⁴ Courts seem more willing to look at the gravity of the offense when a capital sentence is

197. *Solem*, 463 U.S. at 290-91.

198. *United States v. Sarbello*, 985 F.2d 716, 724 (3d Cir. 1993). “[A] district court’s proportionality analysis . . . must necessarily accommodate the facts of the case and weigh the seriousness of the offense, including the moral gravity of the crime measured in terms of the magnitude and nature of its harmful reach” *Id.* “Other helpful inquiries might include an assessment of the personal benefit reaped by the defendant, the defendant’s motive and culpability, and of course, the extent that the defendant’s interest and the enterprise itself are tainted by criminal conduct.” *Id.*

199. *See* Dettling, *supra* note 56. “The proposal calls for those convicted of three violent crimes to receive a life sentence.” *Id.* *See also* OHIO REV. CODE ANN. § 2901.01(I) (Anderson 1993) (which defines an “offense of violence” in the state of Ohio) *supra* note 178.

200. *See* OHIO REV. CODE ANN. § 2901.01(I)(3) (Anderson 1993) (which defines an “offense of violence” as “[a]n offense, other than a traffic offense, under an existing or former municipal ordinance or law of this or any other state or the United States, committed purposely or knowingly, and involving physical harm to persons or a risk of serious physical harm to persons”).

201. *Sarbello*, 985 F.2d at 724.

202. *Taylor v. United States*, 495 U.S. 575, 587 (1990). In discussing a house bill on crime, the Supreme Court characterized arson as a crime “where the conduct involved presents a serious potential risk of injury to others.” *Id.*

203. *United States v. Gio*, 7 F.3d 1279, 1290 (7th Cir. 1993) (amended 1994). One issue before the court was the defendant’s contention that the sentencing enhancement for “recklessly endanger[ing] the safety of another” was not warranted in the case of setting fire to a rural building. *Id.* The defendant claims he made an effort to ensure the building was empty before he started the blaze. *Id.* The 7th circuit characterized arson as a crime with a “predatory nature” and a crime that endangers “fire fighters and others”. *Id.* The court upheld the sentencing enhancement, reasoning that the “fire fighters who responded to the fire faced a substantial risk of death or bodily injury.” *Id.*

204. *People v. Mershon*, 874 P.2d 1025, 1031 (Colo. 1994) (en banc). The Colorado supreme court was reviewing a court of appeal’s ruling, the ruling had affirmed the trial court’s order reduced a felon’s life sentence to 35 years base on a proportionality review. *Id.* at 1028. The Colorado supreme court overruled the court of appeals and held that the drug offenses which Mershon was convicted of “were serious.” *Id.* at 1032. The Colorado supreme court failed to cite a “rare case” example. *Id.*

imposed.²⁰⁵ In *Solem*, the gravity of the offense was minimal because all that the defendant Helm had done was to write a bad check.²⁰⁶

The second prong of the *Solem* analysis requires a court to look at "sentences imposed on crimes in the same jurisdiction."²⁰⁷ In *Solem*, the Court looked at whether "more serious crimes are subject to the same penalty, or to less serious penalties" to determine if a punishment was "excessive."²⁰⁸

All of the crimes enumerated in Ohio's proposed habitual criminal statute are "offenses of violence" which are also first or second degree felonies.²⁰⁹ There are four crimes in the state of Ohio which also fall under this category but are not on the list of offenses contained in the proposed habitual criminal statute, arson,²¹⁰ vandalism,²¹¹ escape,²¹² and carrying a concealed weapon.²¹³ The fact the legislature left these crimes, which are just as severe as those enumerated by the proposed statute, off the list of offenses contained in the proposed statute, is not fatal to the *Solem* analysis.²¹⁴

Applying the "more serious crimes are subject to the same penalty, or to less serious penalties" framework to Carroway's case, a court will look at

205. See, e.g., *Hutto v. Davis*, 454 U.S. 370, 372 (1982). "In rejecting [the Eighth Amendment] argument, we distinguished between punishments -- such as the death penalty -- which by their very nature differ from all other forms of conventionally accepted punishment" *Id.* The Court was discussing its decision in *Rummel*, a case where Rummel's sentence was found not to be disproportionate. *Id.* See *supra* note 109 for a further discussion of *Rummel*.

206. *Solem*, 463 U.S. at 303. "Helm has received the penultimate sentence for relatively minor criminal conduct." *Id.*

207. *Id.* at 291.

208. *Id.*

209. See *supra* notes 146-49 and accompanying text, for a list of the enumerated offenses.

210. OHIO REV. CODE ANN. § 2909.03(B)(2)(c), (B)(3)(b) & (B)(4) (Anderson 1993). Arson is considered an "offense of violence" as defined by Ohio Revised Statute § 2901.01 and can also be a second degree felony in some instances where the property damage or personal injury exceeds \$5000. *Id.*

211. OHIO REV. CODE ANN. § 2909.05(E) (Anderson 1993). Vandalism is considered an "offense of violence" as defined by Ohio Revised Statute § 2901.01 and can also be a second degree felony when the value of the property damage exceeds \$100,000. *Id.*

212. OHIO REV. CODE ANN. § 2921.34(C)(2)(a-c) (Anderson 1993). Escape is considered an "offense of violence" as defined by Ohio Revised Statute § 2901.01 and can also be a first or second degree felony. *Id.*

213. OHIO REV. CODE ANN. § 2923.12(D) (Anderson 1993). Carrying a concealed weapon can be considered an "offense of violence" and can be a felony of the second degree if the "offense is committed aboard an aircraft, or with the purpose to carry a concealed weapon aboard an aircraft." *Id.*

214. See Bayley, *supra* note 16, at 534. "The mere fact that the legislature included only certain offenses as "crimes of violence" does not mean a court should be deterred from engaging in a *Helm* analysis." *Id.*

whether defendants who commit crimes more serious than aggravated arson are subject to less of a penalty than life imprisonment.²¹⁵ Under Ohio law, a person who committed voluntary manslaughter would not be subject to life imprisonment if it was his first offense.²¹⁶ It would appear that this more serious offense is subject to a lesser penalty than that for aggravated arson. However, when using this prong of the analysis the courts have looked at the sentence as it "is imposed to reflect the seriousness of his most recent offense, not as it stands alone, but in light of his prior offenses."²¹⁷ Carroway's crime of aggravated arson must be looked at "in light of his prior offenses."²¹⁸ A person committing a crime more serious than, or just as serious as, aggravated arson would be sentenced to life imprisonment under Ohio's habitual criminal statute.²¹⁹

The final factor to be used in the proportionality test is whether the sentence is analogous to "the sentence imposed for commission of the same crime in other jurisdictions."²²⁰ To analyze Carroway's actions under this prong of *Solem*, the court must look at the sentence which Carroway would receive for the same crime in other states.²²¹ Carroway would receive a sentence just as

215. See *Eckert v. Tansey*, 936 F.2d 444, 449 (9th Cir. 1991). The 9th circuit discusses how the second prong of the *Solem* analysis should be applied in a case where the defendant was sentenced to life imprisonment, under Nevada's habitual criminal statute, for kidnapping. *Id.*

216. OHIO REV. CODE ANN. § 2903.03 (Anderson 1993). Voluntary manslaughter is a aggravated felony of the first degree. *Id.* A first offense for an aggravated felony of the first degree shall be punishable by a prison term of "five, six, seven, eight, nine, or ten years, and the maximum term shall be twenty five years." OHIO REV. CODE ANN. § 2929.11(B)(1)(a) (Anderson 1993).

217. *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992), *cert. denied*, 1113 S. Ct. 146 (1992). A Mississippi court convicted McGruder of "burglary of an automobile, specifically for stealing twenty cases of beer from a delivery truck." *Id.* at 314. The court sentenced him to life imprisonment, without parole, under Mississippi's habitual criminal statute. *Id.* McGruder challenged the sentence averring that the sentence was disproportionate. *Id.* The 9th Circuit upheld the sentence. *Id.* at 317. The court reasoned that McGruder was sentenced under the habitual criminal statute and not as a first time offender. *Id.* at 316. Therefore, when analyzing the sentence a court should look at the sentence not only with respect to the current criminal activity but also with respect to past criminal activity. *Id.*

218. *Id.*

219. See *supra* note 146, which contains the language of Ohio's proposed habitual criminal statute.

220. *Solem*, 463 U.S. at 291.

221. *Eckert*, 963 F.2d at 449. The 9th Circuit compared Nevada's sentencing enhancement for weapons to that of other states. *Id.* After the court completed its analysis it reasoned that Nevada's statute "is indeed harsh, but harshness alone does not render punishment cruel and unusual." *Id.* The court suggested that another consideration must be the state's "ability and power to prescribe sentences for persons convicted of crimes within its borders." *Id.* at 450. The court held that the sentence imposed on Eckert was not cruel and unusual punishment. *Id.*

harsh in most other states for committing aggravated arson, when the commission of the crime caused the defendant to be sentenced as a habitual criminal.²²² Courts have down-played the third prong of the *Solem* analysis, reasoning that courts should give deference to the state's power to legislate punishments for crimes "within [the state's] borders."²²³

Carroway's sentence would not fail the third prong of the *Solem* analysis because not only do other jurisdictions impose similar penalties for the same crime, but courts must give deference to the Ohio state legislature's power to fashion punishments for criminals within the state.²²⁴

The life sentence which Carroway would receive under Ohio's habitual criminal statute is not disproportionate, as it complies with the three factors outlined in *Solem*.²²⁵ Though some justices on the Supreme Court questioned *Solem* and proportionality review in *Harmelin*, courts continue to use the *Solem* analysis to review the proportionality of sentences.²²⁶ There is a possibility that the proposed Ohio statute could be made tougher and still pass the proportionality test. The law should be made as tough as possible because that is what the citizens of Ohio desire.

Suggestions on Ways to Make Ohio's Proposed Habitual Offender Statute Tougher

One way to make the proposed habitual criminal statute more difficult on criminals would be for the legislature to increase the list of felonies that are included in the statute. An overview of the habitual offender legislation in

222. See, e.g., DEL. CODE ANN. tit. 11 § 4214 (1993) (which list first degree arson among the crimes for which a life sentence will be imposed upon the defendant if he has been twice previously convicted of felonies); ILL. REV. STAT. ch. 720 para. 5/33B-1 (1993) (which mandates a sentence of life imprisonment upon a third Class X felony conviction, arson is considered a Class X felony); W. VA. CODE § 61-11-18 (1994) (mandatory life imprisonment for persons, who have served two previous terms in the penitentiary, after a third conviction in which the normally cause the offender to be sentenced to the penitentiary).

223. See, e.g., *Eckert v. Tansey*, 963 F.2d 444, 450 (9th Cir. 1991). The court suggested that another consideration must be the state's "ability and power to prescribe sentences for persons convicted of crimes within its borders." *Id.*

224. See *supra* notes 220-23 and accompanying text.

225. See *supra* notes 196-224 and accompanying text.

226. See *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1423. "The viability of *Solem* has been called into doubt by *Harmelin v. Michigan*." *Id.* (footnotes omitted). "However, because Justice Scalia was joined by only Chief Justice Rehnquist in this analysis, that particular discussion is not considered the judgement of the Court." *Id.* The 10th Circuit used a *Solem* analysis when it reviewed the life imprisonment sentence of an Oklahoma man. *United States v. Angulo-Lopez*, 7 F.3d 1506, 1510 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1563 (1994). "Without determining whether *Harmelin* overruled

other jurisdictions can provide examples of which felonies could be included.²²⁷ Child endangering is an example of a crime that could be included in Ohio's proposed statute.²²⁸ Other states have included this crime in the list of felonies contained in their habitual criminal statutes.²²⁹

A broad statute is more likely to cause criminals to be incarcerated. Alabama law requires three previous felonies before an offender is incarcerated for life.²³⁰ However, Alabama has still imprisoned more offenders for life than Illinois, a state that requires only two previous felonies before life imprisonment is imposed.²³¹ The reason for this appears to be Alabama's willingness to include *any* felony in its list of prior convictions.²³² While, the Illinois statute contains a finite list of felonies.²³³

Another way to make Ohio's proposed habitual offender law tougher would be to allow juvenile felony convictions to be counted towards habitual offender status. Allowing juvenile felony convictions to be counted towards habitual offender status would greatly increase the number of felons taken off the streets.²³⁴ Though, the U.S. District Court decided this issue in 1972 and cited Ohio law in denying the use of juvenile convictions to enhance sentences,²³⁵ it may be time for the Court to overrule this decision.

A decision made by the U.S. Court of Appeals which puts into question the decision made by the U.S. District Court in *Workman v. Cardwell*.²³⁶ The

Solem, we will address Mr. Angulo-Lopez' proportionality concerns under Solem." *Id.* "The [Supreme Court in *Harmelin*] . . . could not reach a consensus on whether a proportionality review should exist, or the appropriate standards to apply when reviewing a sentence for proportionality. Thus, *Harmelin* provides no guidance in articulating the proper approach for an Eighth Amendment review." *Id.* at 1509.

227. See *supra* note 31.

228. OHIO REV. CODE § 2919.22 (Anderson 1993). Child endangering can be a second-degree felony if certain circumstances are present. *Id.*

229. See, e.g., FLA. STAT. ch. § 775.084 (1994) (which includes aggravated child abuse in its list of crimes falling under the habitual offender statute).

230. See *supra* note 164 and accompanying text.

231. See *supra* notes 157-75 and accompanying text.

232. See *supra* note 164 for the language of Alabama's habitual offender statute.

233. See *supra* note 160 for the language of Illinois' habitual offender statute.

234. See Bureau of Justice Statistics, *supra* note 141 at 8. Statistics regarding the number of recidivists who have juvenile records are cited by the Bureau of Justice. *Id.* The younger a person is when they are first arrested the more likely it is that the person will become a recidivist. *Id.*

235. *Workman v. Cardwell*, 338 F. Supp 893, 898 (N.D. Ohio 1972). The court cited the Ohio Revised Code §2151.358 in holding that juvenile convictions cannot be used to "enhance punishment". *Id.* Section 2151.358 reads in part: "The disposition of a child under the judgement rendered or any evidence given in the [juvenile] court shall not be admissible as evidence against the child in any other case or proceeding in any other court . . ." *Id.*

236. See *McCullough*, 967 F.2d 530. The 11th Circuit held "that the enhancement of

Eleventh Circuit's refused to overturn a sentence of life imprisonment without parole imposed pursuant to Florida's habitual criminal statute, a sentence made possible through the use of defendant's prior juvenile convictions.²³⁷

Juvenile crime is on the increase.²³⁸ A large majority of Americans believe that "juveniles should be punished as adults if convicted of a second or third crime."²³⁹ From 1988 to 1992 youth violent crime has soared.²⁴⁰

The public is disturbed about the rise in juvenile crime. The younger a person is when they are first incarcerated the more likely that person is to become a repeat offender. The courts have shown a willingness to allow juvenile convictions to be considered as prior convictions in habitual offender sentencing. Allowing juvenile convictions to be included in Ohio's proposed statute would make the statute tougher, would cause more persons to be incarcerated, and would give the American people what they desire.

CONCLUSION

Crime is of great concern to Ohioans. They want tough laws that keep criminals off the street. Cases like Polly Klaas' emphasize the need for habitual criminal statutes. Ohio's proposed habitual criminal statute could be made tougher on criminals. This is evidenced by comparison to existing statutes in other jurisdictions and by testing the proposed statute using the Supreme Court proportionality test. If Ohio's proposed statute can be made tougher, it should be made tougher. Keep the habitual criminal off the street. Maybe then children like Polly Klaas will live to have sleep-overs with their friends.

THOMAS R. GOOTS²⁴¹

McCullough's adult sentence based on his prior, nonjury juvenile convictions . . . was not a violation of his due process rights." *Id.* at 536.

237. *Id.* The court reasoned that a jury trial for juvenile cases was "a constitutional requirement." *Id.*

238. Patricia Edmonds & Sam V. Meddis, *Public Angry Over Level of Violence*, USA TODAY, Sept. 28, 1994, at 1A. "While the population under age 18 grew 5.7% from 1985-1992, the number of youths arrested for homicide more than doubled." *Id.*

239. Patricia Edmonds, *To Some, Ultimate Penalty is Ageless*, USA TODAY, Sept. 28, 1994, at 11A. In fact 83% believe that juveniles should receive sentences equal to those of adult offenders, after the juveniles have committed a second or third offense. *Id.* People are so disturbed by juvenile crime that many in the public believe that capital punishment should be imposed on juveniles who commit murders. *Id.*

240. Patricia Edmonds, *Courts Walk Fine Line Seeking Juvenile Justice; Judges Must Balance Justice vs. Young Lives*, USA TODAY, Sept. 28, 1994, at 10A. Homicides committed by youths have increased by 51%, robbery by 50%, aggravated assault by 49%, and forcible rape by 17%, from 1988-1992. *Id.*

241. I would like to express my appreciation to my wife and my children. Without their love and support this would not have been possible. I would also like to thank James R. Goots and Ray E. Zbacnik who provided help with editing.

